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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 1074

WINDING GULF COLLIERIES, *Petitioner,*

vs.

THE BOARD OF EDUCATION OF THE COUNTY OF RALEIGH, WEST VIRGINIA, and ALLEMANNIA FIRE INSURANCE COMPANY, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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WINDING GULF COLLIERIES, *Petitioner,*

vs.

THE BOARD OF EDUCATION OF THE COUNTY OF RALEIGH, WEST VIRGINIA, and ALLEMANNIA FIRE INSURANCE COMPANY, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To The Honorable, The Chief Justice And The Associate Justices of The Supreme Court of The United States:

The petitioner, Winding Gulf Collieries, a corporation, prays that a writ of certiorari issue to review the decree or judgment of the United States Circuit Court of Appeals for the Fourth Circuit, reversing the decree or judgment of the District Court of the United States for the Southern District of West Virginia, entered in the case then therein pending upon a bill of interpleader instituted by Allemannia Fire Insurance Company against The Board of Education of the County of Raleigh, West Virginia, and your

petitioner, which said decree or judgment of said District Court awarded and sustained the claim of your petitioner to certain funds payable under numerous insurance policies issued by a number of insurance companies.

OPINIONS BELOW.

The original opinion of the District Court (R. 80) is reported in 60 F. Sup. 68, sustaining the claim of the petitioner to the funds in controversy, for a proper distribution of which petitioner and respondent, The Board of Education of the County of Raleigh, West Virginia, were convened on bill of interpleader by Allemannia Fire Insurance Company. The finding of fact is fully stated in the record. (R. 92.) The conclusions of law were made by the trial court. (R. 96.) The decision of the Circuit Court of Appeals, reversing the District Court, is reported in 152 F. (2d) 382. (R. 137.)

JURISDICTION.

The original opinion of the Circuit Court of Appeals was made and its judgment was entered on the 12th day of December, 1945. Petition for rehearing was filed on the 10th day of January, 1946. The final order, denying rehearing, was entered on the 5th day of February, 1946. (R. 165.) The order staying the mandate for sixty days was entered on the 8th day of February, 1946. (R. 165.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, (28 U. S. C. A., Section 347).

QUESTIONS PRESENTED.

The questions presented in this case are:

1. Whether the Circuit Court of Appeals properly con-

strued the fire insurance policy contracted and issued in and under the laws of the State of West Virginia.

(a) The Statute of West Virginia prescribes a uniform policy of fire insurance to be issued by fire insurance companies, doing business in West Virginia, and expressly prohibits the issuance of any policy of fire insurance in any other form (see statute in Appendix to Brief with this petition), and the form of policy thus prescribed has and bears a provision rendering the policy absolutely void unless the ownership or the interest of the insured is sole and unconditional and in case of a building the insured be the unconditional owner of the land on which the building is built, in fee simple, unless an agreement in writing be attached to such policy, prescribing *"the extent of the application of insurance under the policy."* (See statute in Appendix.)

(b) The building insured in the instant case was on ground not owned by the named insured in fee simple, and the interest of the named insured was other than unconditional and sole ownership. To prevent the policy, under such circumstances, from being utterly void under the statute, there was printed in the space indicated by the statute and added to the policy at such space, as provided by the statute, an agreement in writing, by apt and appropriate words, *extending the insurance to all persons* having interest in the property.

(c) The words used were: "Assured The Board of Education of the County of Raleigh as is now or may hereafter be constituted *for account of whom it may concern,*" (Emphasis our own) which language has a well-defined meaning, force and effect, and comprehends and indemnifies all persons having any interest in the subject of in-

surance, as construed and determined by this Court in *Hagan* v. *Scottish Union & National Insurance Company,* 186 U. S. 423, 22 S. Ct. 862, 46 L. ed. 1229, and the Supreme Court of West Virginia (substantially the same language), in *Murdock* v. *Insurance Company,* 33 W. Va. 407, 10 S. E. 777, and many other cases adjudicated by this Court, which cases the Circuit Court of Appeals refused to apply in the instant case.

2. Whether Section 7, of Article 4, of Chapter 33 of the Official Code of West Virginia (Michie's Code, Serial Section 3366) and Section 8, of Article 4, of Chapter 33 of the Official Code of West Virginia (Michie's Code, Serial Section 3367), is violated both in letter and spirit, if the policy in controversy is to be construed as the Circuit Court of Appeals has construed it in the instant case.

3. Whether a policy of fire insurance contracted, issued and delivered in West Virginia, insuring a building against damage or destruction by fire, and the named assured is not the fee simple owner of the land on which the building stands, or the sole and unconditional owner of the building, and in such circumstances, under the provisions of the West Virginia Statute, such policy is so written that the same may conform to the statute, bearing the stipulation in writing, required by the statute, defining the extent of the insurance, is to be so construed as to give such words, *defining the extent of the insurance,* the technical and previously determined legal meaning attributed to them by both the Supreme Court of the United States and the Supreme Court of West Virginia, or shall such stipulation be ignored and by mere *ipse dixit* held to have been intended to mean nothing more than the contract would have meant had not such words been used.

4. Whether equitable principles will be invoked for the proper distribution of funds payable as indemnity under the terms of a matured fire insurance policy, where the policy is issued, insuring real estate, i.e., a building, the title to which is held by a tenant in possession, with reversion to another person upon the termination of a particular use of the property by such tenant in possession, and the policy bears the words "for account of whom it may concern," and such words were manifestly used to define the extent of the insurance and describe the intended assured, and the property is totally and completely destroyed by fire and the tenant in possession ceases to use the property for the intended purpose and abandons the property and the remainderman or reversioner becomes reinvested of his whole estate before the indemnity is paid.

5. Whether the indemnity, payable under an insurance policy insuring a building against the hazard of fire and the building is totally destroyed, stands in the place of the building, when the possessory title to the building was in the named assured, then in possession, but whose title is dependent upon a particular use of the property, with reversion to another upon cessation of such use, and immediately upon the maturity of the policy, such tenant in possession ceases to use the premises for the intended purpose and abandons the same, and the whole estate therein thereupon reverted to the remainderman. Will equity, under such circumstances, reconvert the indemnity into realty, to protect the interests of the different owners and the different estates, where it is manifest from the language used and the circumstances attending the issuance of the policy, that indemnity for the whole title was contemplated by the contracting parties?

STATUTES INVOLVED.

The pertinent statutes involved are Sections 7 and 8, of Article 4, of Chapter 33 of the Official Code of West Virginia. They are reproduced in the Appendix to the Brief accompanying this petition.

STATEMENT OF THE CASE.

On the 22nd day of December, 1944, Allemannia Fire Insurance Company filed its bill of interpleader in the District Court of the United States for the Southern District of West Virginia (R. 3) and process issued thereon (R. 9), convening petitioner and The Board of Education of the County of Raleigh, West Virginia, as a test case (R. 28-38), to determine the conflicting claims of the petitioner and The Board of Education of the County of Raleigh, West Virginia, to the indemnity under certain fire insurance policies issued by Allemannia Fire Insurance Company and some forty-two other insurance companies, arising out of the total destruction of a school building by fire, which was covered and insured by said insurance companies. The conflicting claims to the proceeds of indemnity arise out of the following circumstances:

1. On the 26th day of April, 1924, The Board of Education of Slab Fork District in the County of Raleigh, predecessor of The Board of Education of the County of Raleigh, West Virginia, determined to establish a high school in that magisterial district of the county, and to accomplish said purpose submitted a bond election to the voters of that political subdivision, by which election The Board of Education of Slab Fork District in the County of Raleigh was authorized to issue $130,000.00 of its school bonds. Under the call for the election it was provided that the school building would be located at or near the Village of Winding Gulf. The officials of The Board met with the officials of Winding Gulf Colliery Company, predecessor

of Winding Gulf Collieries, and they then and there had a verbal agreement, after inspecting the premises and specifications of the contemplated building, that such building would be located upon lands of Winding Gulf Colliery Company, to be used solely for public free school purposes, and upon cessation of the use thereof, the building was to revert to and become the property of the Winding Gulf Colliery Company. This was a perfectly legal contract under the laws of West Virginia. *Board of Education* v. *Harvey*, 70 W. Va. 480, 74 S. E. 507.

2. This parol agreement was carried into a written agreement by a deed dated the 23rd day of August, 1924, (R. 18) in which deed the previous parol agreement was expressed in the following language:

> "It is further distinctly understood and agreed by and between the parties hereto as a part of the consideration for this conveyance, that the property hereby conveyed is for public free school purposes only and for no other purpose or purposes and that the same and no part thereof shall at any time be used for any other purpose or purposes whatsoever and that whenever the said property hereby conveyed shall cease to be used for public free school purposes, the same and every part hereof shall thereupon ipso facto revert to and become reinvested in, the said party of the first part, its successors or assigns, in fee simple, with like force and to the same effect as if this conveyance had never been made."

3. By legislative enactment, (R. 133) respondent, The Board of Education of the County of Raleigh, West Virginia, succeeded to all the rights, properties and interests of The Board of Education of Slab Fork District in the County of Raleigh. Winding Gulf Collieries, by deed dated

the 15th day of August, 1929, succeeded to the rights of Winding Gulf Colliery Company. (R. 124.)

4. The Board of Education of Slab Fork District entered into the possession of the property conveyed by the deed aforesaid and built and constructed thereon a large and commodious high school building, and it, and its successor, occupied and used the premises for such public free school purposes for about twenty years.

5. On the first day of December, 1943, The Board of Education of the County of Raleigh, West Virginia, purchased broad, comprehensive, blanket insurance policies, all in substantially the same form, which were issued by forty-three insurance companies, for various principal amounts, the total amount in the instant policy was $142,000.00. (R. 24.) The coverage was, "on all buildings and structures of every description, * * * occupied for educational purposes and purposes necessary or incidental thereto, while located on premises owned, occupied, leased or used by the assured in Raleigh County, West Virginia." This policy was written on the standard form of fire insurance policy prescribed by the Statute of West Virginia (see photostatic policy with the transcript), but with provisions, riders and stipulations, giving the description of the property covered as above stated, and naming "The Board of Education of the County of Raleigh and legal representatives" as the named assured. In as much as the named assured was not the owner in fee of the lands on which many of the buildings stood, of which the instant case is one, it was necessary, under the West Virginia Statute, to insert special provisions to make the policy conform to the West Virginia Statute, otherwise the policy would be void. To accomplish this purpose and define "*the extent and application of the insurance under the*

policy," as required by the statute under such circumstances, and to further describe the estate and interests intended to be insured, and following the first paragraph naming "The Board of Education of the County of Raleigh and legal representatives" as the named assured, a rider or insertion was made in this language:

"ASSURED

THE BOARD OF EDUCATION OF THE COUNTY OF RALEIGH

As is now or may hereafter be constituted
For account of whom it may concern

Loss, if any, under this policy shall be adjusted with and held payable to the Board of Education of the County of Raleigh."

6. On the 5th day of January, 1944, the school building was totally destroyed by fire and The Board of Education immediately ceased to use the premises for public free school purposes, and abandoned the same and the whole title thereupon reverted to petitioner, as contemplated by the intent, spirit and meaning of the deed above referred to. The indemnity payable under the insurance policies has been ascertained and adjusted. The amount payable by the insurance companies on account of the total destruction of the school building, has been ascertained and fixed at $67,201.02. The amount for which Allemannia Fire Insurance Company is liable is $4,771.27. The Allemannia Fire Insurance Company has deposited the money into the registry of the District Court of the United States for the Southern District of West Virginia, and filed its bill of interpleader and enjoined the claimants from prosecuting their respective claims to the insurance indemnity.

The District Court awarded the indemnity to petitioner. The Circuit Court of Appeals reversed the District Court and awarded the indemnity to The Board of Education of the County of Raleigh.

SPECIFICATIONS OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In reversing the decree of the District Court of the United States for the Southern District of West Virginia.

(a) In refusing to give to the language, "for account of whom it may concern," as used in this policy, their previously determined legal significance and meaning, as established by the Supreme Court of the United States. They are technical words with universal recognized legal meaning, and apply not only to all persons, but to every specie of interest and property in the subject insured.

(b) In refusing to follow the Supreme Court of the United States and the Supreme Court of the States of West Virginia, as to the legal and technical meaning to the words, "for account of whom it may concern," when used in an insurance policy describing the insured and extent of the insurance and the District Court having rightfully followed that holding and construed the policy as indicated by the Supreme Court of the United States and the Supreme Court of the State of West Virginia, it was the duty of the Circuit Court of Appeals to follow and apply and enforce the language used as indicated by such previous decisions.

(c) In the holding, by the Circuit Court of Appeals, that the language used in the instant policy, under the circumstances, did not disclose an intention to cover the reversionary interest of this petitioner. Such holding is arbitrary and without facts on which to sustain or support it, especially in the light of the fact that the policy was drawn with such meticulous care by the adoption and use of such well recognized language, reinforced by the perfectly patent purpose of conforming to the statute to make the policy valid; and without which the policy would have been invalid;

(1) by inserting in the policy a broad, general, description of the property intended to be covered, i.e., "all buildings and structures of every description * * * occupied for educational purposes * * * while located on premises owned, occupied, leased or used by the assured in Raleigh County, West Virginia; and (2) by inserting therein a stipulation disclosing "the extent of the application of insurance under the policy, i.e., "for account of whom it may concern," and the use of other apt and appropriate words, for the purpose of complying with the sole ownership provision of the standard form of policy prescribed by the statute.

(d) In failure to take cognizance of the Statutes of West Virginia, (Section 7, of Article 4, of Chapter 33, and Section 8, of Article 4, of Chapter 33 of the Official Code of West Virginia, Michie's Code, Serial Sections 3366-3367—See Appendix) which are a part of the contract of insurance in the instant case, and the decision of the Circuit Court of Appeals reads the same out of the contract and fails to give the statutes their full force and effect according to their true intent, spirit and meaning.

2. The words, "for account of whom it may concern," used in defining the extent of the insurance and describing the intended assured, in the instant fire insurance policy, together with other clauses in the policy denying the insurer the defense arising out of limitation upon the interest or title of the named assured, insures the whole fee title in the property covered and converts the insurance policy into a covenant real running with the land, and under such policy principles similar to those controlling the insurance of property held in trust govern funds payable upon the maturity of such policy. Such policy will not be confined to the interest of the named assured, but covers the interest of all owners and may be adopted by any

person having an insurable interest in the subject of insurance, even after the loss.

3. Where a policy of insurance such as is involved in the instant case, exists, and the title is held by different persons of diverse interests, and the subject of insurance is real estate, and the policy matures by the occurrence of the event against which the policy was issued to indemnify, and the real estate is thus involuntarily converted into money, equity will reconvert the same into realty to protect the interests of the different owners and the different estates, and the money will stand in the place of the land and be held by each owner as of their respective estates in the real estate.

REASONS FOR GRANTING THE WRIT.

The Circuit Court of Appeals, in reversing the decision of the District Court, has failed to give to the insurance policy in controversy the well recognized and almost universal construction attributed to the language used, to express the intention of the contracting parties, and has construed the contract contrary to the applicable decisions of this Court, and has departed from the accepted and usual course of judicial proceedings.

The words and language involved in the policy of insurance, and more specifically pointed out in this petition, which were erroneously construed by the Circuit Court of Appeals, are of such ancient and universal origin that the same, from such usage in the insurance business, have become a rule of property, by which the rights of contracting parties have been fixed and established with previous certainty, by uniform line of decisions, especially since the decision of this Court in the case of *Hagan* v. *Scottish Union & National Insurance Company*, 186 U. S. 423, 46 L. ed. 1229.

The decision of the Circuit Court of Appeals, if permitted to remain unreversed, will render such rules governing the property rights of contracting parties uncertain and indefinite. Contracts of fire insurance are so essential to modern commerce and enterprise that the forms of such contracts, from the very nature of the undertaking, should be established with such certainty that the contracting parties would feel a sense of security in the validity of their contracts, without waiting the event of the catastrophe contemplated, to wager their rights on matters of construction of language of doubtful and uncertain meaning.

The Statutes of West Virginia, Section 7, of Article 4, of Chapter 33 of the Official Code of West Virginia, (Michie's Serial Section 3366) and Section 8, of Article 4, of Chapter 33 of the Official Code of West Virginia, (Michie's Serial Section 3367), appearing in the Appendix of the Brief accompanying this petition, became and were a part of the insurance policy in controversy, and the decision of the Circuit Court of Appeals ignores and fails to give these statutes the full force and effect to which the same are entitled.

PRAYER.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Fourth Circuit, sitting at Richmond, Virginia, commanding that Court to certify to and send to this Court on a day certain to be therein named, a full and complete transcript of the record and all proceedings had in this case, numbered and entitled in its docket 5418, to the end that this case may be reviewed and determined by this Court; that the decree of the United States Circuit Court of Appeals rendered herein on the 12th day of December, 1945, and its final order denying rehearing, rendered on the 5th day of February, 1946, may be reversed by this Honorable Court, and that the judgment and decree of the District Court of the United States for the Southern District of West Virginia, entered on the 10th day of May, 1945, be reinstated and held to be firm and valid; and that your petitioner may have such other and further relief in the premises as may seem just and proper, and your petitioner will ever pray, etc.

WINDING GULF COLLIERIES,
Petitioner.

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BRIEF IN SUPPORT OF PETITION.

OPINIONS BELOW.

One opinion was delivered by the District Court (R. 80). It was written by District Judge, Honorable Ben Moore, and filed the 9th day of April, 1945. It appears on page 80 of the record and is reported in 60 F. Sup. 68. The opinion of the Circuit Court of Appeals was written by Honorable Morris A. Soper, Circuit Judge, and concurred in by Honorable Armistead M. Dobie, Circuit Judge, and Honorable Johnson J. Hayes, District Judge, and was filed and announced on the 12th day of December, 1945, and appears on page 137 of the record, and is reported in 152 F. (2d) 382.

JURISDICTION.

The jusisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347). The judgment of the Circuit Court of Appeals was entered on the 12th day of December, 1945 (R. 145). The petition for rehearing was filed on the 10th day of January, 1946 (R. 165). The final order denying rehearing was entered on the 5th day of February, 1946 (R. 165). The order staying the mandate for sixty days was entered on the 8th day of February, 1946, granting extension for filing petition for certiorari, the same being granted by Circuit Judge, Honorable Armistead M. Dobie (R. 165).

NATURE AND CHARACTER OF THE PROCEEDING.

This was an action brought by the Allemannia Fire Insurance Company of Pittsburgh, of the State of Pennsylvania, against The Board of Education of the County of Raleigh, of the State of West Virginia, and Winding Gulf Collieries a corporation, of the State of West Virginia, convening the defendants to that bill for the purpose of determining the proper distribution of the indemnity arising out of a matured fire insurance policy, the amount of which had theretofore been ascertained, and was paid into the registry of the District Court of the United States for the Southern District of West Virginia, to abide the decision of that Court. The District Court awarded the fund to petitioner (R. 76). Appeal was taken by The Board of Education of the County of Raleigh to the Circuit Court of Appeals, Fourth Circuit, and the decree of the District Court was reversed by that Court (R. 145). Petition for rehearing was filed in due course, and rehearing was denied (R. 165).

FOREWORD.

The facts have been set out sufficiently in the petition to fairly present the case and it would serve no good purpose to restate them here, yet such facts as may be necessary to present our position will be stated throughout the course of this brief. We will sometimes hereinafter refer to The Board of Education of the County of Raleigh, West Virginia, as The Board, and generally refer to Winding Gulf Collieries, as petitioner.

ARGUMENT.

At the very outset of this argument, to properly develop the questions presented by the petition, it is necessary that we direct the Court's attention specifically to the pertinent parts of the Statutes of West Virginia, printed in the Appendix to this brief.

The Statutory Standard Form of West Virginia Fire Insurance Contract.

In the exercise of its power of regulation, the Legislature of West Virginia enacted Section 7, of Article 4, of Chapter 33 of the Official Code of West Virginia (see statute in Appendix), prescribing the standard form of fire insurance policy, which can lawfully be used in West Virginia, and expressly prohibiting the use of any other form. The pertinent provision is in the following language:

> "No fire insurance company, its officers or agents, shall make, issue or deliver for use any policy, against loss by fire only, or the renewal of any such policy, on property in this State other than such as shall conform in all particulars as to blanks, size of type, context, provisions, agreements and conditions as set forth herein."

Immediately following this enacting clause, there is set out in the statute a complete form for a fire insurance contract. The applicable paragraph of the permissible form with which we are concerned is in the following words:

> "This entire policy shall be void, unless otherwise provided by agreement in writing added hereto, Ownership, etc. (a) if the interest of the insured

be other than unconditional and sole ownership; or (b) if the subject of insurance be a building on ground not owned by the insured in fee simple; * * * or (d) if any change, other than by the death of an insured, take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazards); or (e) if this policy be assigned before a loss."

The Enabling Section of the Statute.

Insurers having less than the sole and unconditional ownership of the subject of insurance, or in case of a building, non owners of the fee simple title of the land on which the building stands, can only insure within the scope of the enabling provisions of Section 8, of Article 4, of Chapter 33 of the Code of West Virginia (see statute in Appendix), which provides:

"No other or different provision, agreement, condition or clause shall be in any manner made a part of such contract or policy or indorsed thereon or added thereto or delivered therewith, except as follows, to-wit:

(a) * * *

(b) * * *

(c) There may be printed in the space indicated by the words 'space for description of property,' or added to the policy at such space by agreement in writing thereon or by rider attached thereto the following: (1) Descriptions and specifications, by schedule or otherwise, of the property covered by the policy; (2) *The extent of the application of in-*

surance under the policy; * * * (4) Any other matter necessary clearly to express all the facts and conditions of insurance on any particular risk. Provided, however, *That no such agreement or rider shall be inconsistent with or a waiver of any of the conditions or provisions of the standard fire insurance policy hereby established,* except that in the case of a mortgagee not named in the policy as the insured, such provisions may be added as shall not be inconsistent with or a waiver of any of the provisions of the said standard policy relating to mortgage interests, but if so added, shall include the provisions of a standard rider or indorsement relating to such interest the form of which shall have been approved by the insurance commissioner and filed in his office as hereinafter provided;"

(Emphasis our own)

The Statute of West Virginia Prescribing the Standard Form of Fire Insurance Policy is a Remedial Statute, Founded on Public Policy, and Those to Whom It Applies Will Not Be Permitted to Waive Its Provisions. The Statute Becomes a Part of the Contract and Prevails Over Stipulations of the Parties.

This statute adopts in West Virginia what has become generally and commonly known throughout the country as the New York Standard Form of Policy. It is of general and wide use and adopted by the Legislatures of the most of the states of the union, and where it has been adopted its use has uniformly been held to be compulsory, permitting such changes only as are authorized by the statute. It is the only form of fire insurance contract which may

lawfully be used in states so adopting the same, and while the statutory form does not prohibit the contracting parties from inserting in or attaching to the policy, terms or conditions, not found in the standard form, yet such terms or conditions cannot lawfully be inserted which are inconsistent with, or a waiver of any of the provisions of such standard form prescribed by the statute. So far as the conditions and provisions of the form go they are controlling and may not be omitted, changed or waived. The provisions of the standard form not only constitute the only permissible contract between the parties, but it is the law between the parties. The statute is founded on public policy. These statutes are universally construed to be remedial statutes, and mandatory in their provisions and they are liberally construed to compel performance with their provisions.[1]

The West Virginia Statute was in full force when the

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[1] Heim v. American Alliance Co. of N. Y., (Minn.) 180 N. W. 225.
Wild Rice Lumber Co. v. Royal Ins. Co., 99 Minn. 190, 108 N. W. 871.
Hronish v. Home Ins. Co., 33 S. D. 428, 146 N. W. 588.
Lawver v. Globe Mutual Ins. Co., 25 S. D. 549, 127 N. W. 615.
Hamilton v. Royal Ins. Co., 156 N. Y. 327, 50 N. E. 863, 42 L. R. A. 485.
Fidelity-Phenix Fire Ins. Co. v. School District No. 62 of Jackson County, (Okla.) 174 P. 513.
Palatine Ins. Co. v. Commercial Trust Co., (Okla.) 175 P. 930.
Northern Assurance Co. v. Grand View Bldg. Asso., 180 U. S. 308, 46 L. Ed. 213.
26 C. J., "Fire Insurance—Statutory Forms," Sec. 49, p. 57.

contract of insurance now in controversy was effected, and it clearly affects the construction and validity, as well as the permissible contracting provisions. These statutes become a part of the contract of insurance as fully and completely as if they had been written into the contract.[2]

Interpretation Sole Ownership Clause.

This form of policy has for many years been of general use throughout the United States. The sole ownership clause has frequently been drawn to the attention of the courts. In Cooley's Briefs on Insurance, Volume 3, at page 2171, the reason for this clause in an insurance policy is stated as follows:

> "The purpose in requiring the insured to have the sole and unconditional ownership of the insured property is to give protection only to those upon whom the loss insured against would inevitably fall, but for the insurance, and to avoid taking risks for those whose lack of interest, or whose contingent interest in the property might tend to encourage

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[2] Shinn v. West Virginia Insurance Co., 104 W. Va. 353, 140 S. E. 61.
State v. Wotring, 56 W. Va. 394, 49 S. E. 365.
Hicks v. Randich, 106 W. Va. 109, 144 S. E. 887.
Thomas v. Matthiessen, 232 U. S. 221, 58 L. Ed. 577.
State for use, etc. Finley Bros. Co. v. Freshwater, 107 W. Va. 210, 148 S. E. 6.
Tug River Lumber Co. v. Smithey, 107 W. Va. 482, 148 S. E. 850.
29 Am. Jur., "Insurance," Sec. 180, p. 197.
29 Am. Jur., "Insurance," Sec. 190, p. 206.
26 C. J., "Fire Insurance," Sec. 78, p. 81.

carelessness or wrongdoing in its use or preservation * * *; *and to prevent one who has an undivided or contingent, but insurable interest in property from appropriating to his own use the proceeds of the policy taken on the valuation of the entire and unconditional title, as if he were the sole owner, and to remove from him the temptation to perpetrate fraud and crime* * * *." (Emphasis our own)

This statute has been frequently enforced by the Supreme Court of West Virginia in a multiplicity of circumstances attending contracts of insurance.[3]

The Status of the Title and Ownership in the Instant Case.

The status of the title to the property involved in the instant case brings us squarely within the purview of the prohibited circumstances contemplated by the statute, and the paragraph of the standard form of policy quoted above. Every reason assigned for the statute by Mr. Cooley applies to our circumstances here with great force. The most that could be said for the title of The Board of Education for the County of Raleigh, to the insured building, in the instant case, is, that it held under its deed an exclusive right to the possession of the property, yet a limited exclusive right, a naked right to use the property for a specific purpose and none other. The Board could not convey the property, could not lease the property, nor could it

[3] Tyree v. Virginia Ins. Co., 55 W. Va. 63, 46 S. E. 706.
Kirk et al v. Queens Ins. Co., 126 W. Va. 213, 27 S. E. (2d) 596.
Hamlet v. American Fire Ins. Co., 107 W. Va. 687, 150 S. E. 7.

devote it to any use other than public free school purposes; the mere naked right to possession for the limited purpose as specified is all the right The Board had. All other rights to this property, including the right of reversion and the right to control the use of the property, was in petitioner; this was certainly the dominant title and estate, and it controlled the use and other attributes of ownership. Under such circumstances it is patent and apparent that The Board of Education could not lawfully, under these statutes, insure for its sole benefit, the whole title to the building destroyed. Under such circumstances it became necessary for the contracting parties to utilize the enabling section of the statute to render the policy a valid contract, indeed to enable them to effect any valid fire insurance upon the building for any indemnity at all.

Contracting Parties Presumed to Act Lawfully.

These statutes presented the limitation within which the contracting parties were compelled to contract, else their contract would be utterly and totally void. It is certainly not a violent presumption to presume that the contracting parties used language which they, at any rate, thought would conform with the statute. They were trying to make a lawful contract or to purposely and intentionally evade the statute. The latter intention will not be attributed to them unless the facts leave no other fair and rational conclusion; unless the language used will bear no other reasonable interpretation, they will be presumed to have intended to obey the law.[4] This is especially true as to the

[4] Chambers v. Cline, 60 W. Va. 588, 55 S. E. 999.
Great Northern Ry. Co. v. Delmar Co., 283 U. S. 686, 75 L. Ed. 1349.
Ewing et al v. Howard, 7 Wallace 499, 19 L. Ed. 293.

action of The Board of Education, its membership being sworn public officers.[5] It is a fair presumption also that they solemnly, carefully and advisedly selected words to serve their purpose, to make their contract both certain and lawful; this is what they were in fact trying to do, without evasion or attempted circumvention of the statute, within the scope of which they were contracting, and this is what they did.

Intention to Insure the Whole Title and Indemnify All Interested Parties—Analysis of the Contract.

The language used in the insurance contract by the contracting parties, must be construed in harmony with the statute, if it is susceptible of such construction.[6] At the very inception of the contract the assured is described as "The Board of Education of the County of Raleigh and legal representatives." It was apparent to the contracting parties that such a policy, simply naming The Board and legal representatives and covering buildings, "occupied for educational purposes * * * while located on premises * * * occupied, leased or used by the assured in Raleigh County, West Virginia," of which building The Board was not the sole and unconditional owner and did not own the land in fee simple, on which the building stood, as in the instant case, would be in conflict with the statute and totally and completely void. They were confronted with the

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[5] Board of Education of Hancock County v. Hartford Fire Ins. Co., 124 W. Va. 163, 19 S. E. (2d) 448.
Knox County v. National Bank City of N. Y., 147 U. S. 90, 37 L. Ed. 93.
20 Am. Jur., "Evidence," Sec. 187, p. 182.

[6] See authorities under Footnotes 1 and 2.

statutes with which they had to conform. The contracting parties realizing the contract would not be enforcible with the description of the assured as "The Board of Education of the County of Raleigh and legal representatives" alone, under the attending circumstances of the instant case, inserted a rider, as they could lawfully do under the statute and to accomplish this purpose, which rider was in the following words: "Assured The Board of Education of the County of Raleigh as is now or may hereafter be constituted for account of whom it may concern." (R. 26.) It is apparent that this rider was inserted in this contract pursuant to the West Virginia Statute and pursuant to the statute was intended to describe the scope and *extent of the insurance* as was required by the statute. The term used in the rider, "The Board of Education of the County of Raleigh as is now or may hereafter be constituted," did not materially change the scope and extent of the insurance from the original designation, "The Board of Education of the County of Raleigh and legal representatives." These phrases upon final analysis have substantially the same meaning. In the rider additional words were used. The words, "for account of whom it may concern," were inserted, and they must be given their meaning.[7] These

[7] Henderson Development Co. v. United Fuel Gas Co., 121 W. Va. 284, 3 S. E. (2d) 217.
Clayton et al v. Nicely et al, 116 W. Va. 460, 182 S. E. 569.
City Service Gas Co. v. Kelly-Dempsey & Co., 111 F. (2d) 247.
E. I. Du Pont De Nemours & Co. v. Claiborne-Reno Co., 64 F. (2d) 224, 89 A. L. R. 238.
Ehnes v. Hronis et ux, 127 N. J. L. 551, 23 A. (2d) 592.
Barbarsol Co. v. Leggett, (Ind.) 19 N. E. (2d) 481.
12 Am. Jur., "Contracts," Sec. 241, p. 772.

are words having a definite legal meaning and effect.[8] They are of ancient origin and frequent use in the insurance business. No better history of their origin or of the meaning attributed to them, can be found than that established by this Court in the case of Hagan v. Scottish Union & National Insurance Company. Since the decision in the Hagan case, it seems to have met with general approval and has become firmly established and followed by the text writers on insurance and the court generally. No authority, so far as we have been able to ascertain, has found fault or criticized that decision. Where words or terms, having a previously definite determined legal meaning and effect are knowingly and solemnly used in a written instrument, the parties thereto will be presumed to have intended such words or terms to have such previously determined mean-

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[8] Murdock v. Franklin Ins. Co., 33 W. Va. 407, 10 S. E. 777.

Hagan v. Scottish Union & Nat. Ins. Co., 186 U. S. 423, 46 L. Ed. 1229, affirming same v. same, 98 F. 129.

New Orleans & Southern American S. S. Co. v. Grace & Co., 26 F. (2d) 967, 969, certiorari denied 49 S. Ct. 33, 278 U. S. 636, 73 L. Ed. 552.

Hooper v. Robinson & Cox, 25 L. Ed. 318.

1 Phillips, Insurance, Sec. 385.

2 Duer, Marine Insurance, p. 28.

29 Am. Jur., "Insurance," Sec. 205, p. 214.

Cooley's Briefs on Insurance, Vol. 3, p. 2171.

Vance on Insurance, p. 421.

Joyce on Insurance, (2d) Vol. 2, Secs. 964, 966, p. 2053.

ing and effect.[9] It is apparent that the Circuit Court of Appeals attributed to the words, "for account of whom it may concern," no meaning and gave to the contract no more or different meaning than it would have, had the words, "The Board of Education of the County of Raleigh and legal representatives," or the words, "The Board of Education of the County of Raleigh as is now or may hereafter be constituted," alone, been used to describe the assured. This presents a parallel question of interpretation to that which was presented in the Hagan case, concerning it this Court said:

> "There is no doubt, and the district court so found, that Hagan intended by the policy to secure the insurance upon the entire title; and he therefore intended thereby to protect that title during the running of the policy, and when the clause is added in writing that it was issued on account of whom it may concern, it shows that he intended that such title should be protected in the hands of any person to whom he might transfer the same or any portion thereof. If otherwise, and the intention were only

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[9] Marguerite Coal Co. et al v. Meadow River Lumber Co., 98 W. Va. 698, 127 S. E. 644.
Langley v. Owen, 52 Fla. 302, 42 So. 457, 11 Ann. Cas. 247.
Rothchild v. Winthel, 191 Ind. 85, 131 N. E. 917.
In re American Steel Supply Syndicate, 256 F. 876, 879.
Heist et al v. Dunlap & Co., et al, 193 Ga. 462, 18 S. E. (2d) 837.
Fidelity & Casualty Co. of N. Y. v. Lowenstein, 97 F. 17.
12 Am. Jur., "Contracts," Sec. 238, p. 764.
26 C. J., "Fire Insurance," Sec. 76, p. 79.

to protect his own interest, the policy, as stated by the district judge, would naturally have been taken out in his own name, omitting the qualifying phrase, on account of whom it may concern. This phrase was put in for some purpose and such purpose was, as it seems to us, to protect the whole title without making it necessary to notify the company and obtain its consent to any transfer of interest."

The Words, "For Account of Whom It May Concern," Create a Trust Relationship.

The courts, both before and since the Hagan case, generally recognized that the phrase, "for account of whom it may concern," or words of like import, when used in a fire insurance policy, create a trust relationship between the named assured and the insurer and any other person holding an insurable interest in the subject of insurance. The Supreme Court of West Virginia recognizes this principle and has authoritatively declared it.[10] It is perhaps most clearly stated in Cooley's Briefs on Insurance, Volume 2, page 1265. Mr. Cooley, upon analysis of the principles enunciated in the Hagan case, so interprets that case and states the principle in the following language:

"Principles similar to those controlling the insurance of property 'held in trust' govern also insurance 'for account of whom it may concern.' Such a policy will not be confined to the interest of the insured, but may cover the interests of the owners, and may be adopted by them, even after the loss."

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[10] Murdock v. Ins. Co., 33 W. Va. 407, 10 S. E. 777.
Sheppard v. Peabody Ins. Co., 21 W. Va. 368.
Lucas v. Ins. Co., 23 W. Va. 258.

Prohibitive Statutory Provisions Prevail Over Conflicting Contractual Stipulation.

We are not unmindful of other special provisions in the contract of insurance in controversy, which were stressed by the Circuit Court of Appeals. We recognize the fact that in the rider heretofore discussed, this language appears: "Loss, if any, under this policy shall be adjusted with and held payable to The Board of Education of the County of Raleigh." Other provisions under the title, "Special Provisions," quoted and relied upon by the Circuit Court of Appeals in its decision, are:

> "* * * The Board of Education of the County of Raleigh as is now or may hereafter be constituted shall be deemed the owner of the property herein named, described and covered by this policy, and no defect in the title to such property shall invalidate this policy in whole or in part.
>
> Should any of the within described property be situate on lands not owned by the assured in fee simple, this insurance shall not be affected thereby."

If the contracting parties, by use of this language, have attempted to enter into a contract of insurance, pursuant to which the interest *only* of the Board of Education was insured, and *none other*, then this language can have no force or effect for the reason that it would contravene the express prohibitive statute.

Section 8, of Article 4, of Chapter 33 of the Code of West Virginia, in subdivision (c)-(4), prescribes "that no such agreement or rider shall be inconsistent with or a waiver of any of the conditions or provisions of the standard fire insurance policy hereby established."

It is perfectly patent that if it were not for the saving clause, "for account of whom it may concern," the above quoted language of the contract, standing alone, would be in direct conflict with the paragraph of the standard form of policy prescribed by the West Virginia Statute, hereinbefore quoted, thereby invalidating the whole policy for the reason that the assured was not the sole and unconditional owner of the subject of insurance and which subject of insurance stood on lands not owned by the named assured in fee simple.

Under such circumstances, it is axiomatic that the existing and statutory provisions enter into and form a part of the contract of insurance and are applicable as fully as if such provisions were written into the contract, and that the statute will prevail and have precedence over the language used by the contracting parties. If the words, "for account of whom it may concern," are ignored, it is clear that the whole contract of insurance is in conflict with the statute and for that reason totally and completely void. The words, "for account of whom it may concern," must be given full force and effect, they must be given the definite legal meaning which the authorities attribute to them. When used in the insurance policy, in the juxtoposition in which they are placed in the instant case, they mean, The Board of Education of the County of Raleigh, "as well in its own name as for and in the name (without specification) of all and every other person and persons to whom the same (the property insured) doth, may, or shall appertain in part or in all." Hagan v. Scottish Union & National Insurance Company, supra. If these words are given this meaning, or meaning of like import, then the above quoted language can be given lawful force and effect to clearly demonstrate an intention to insure the whole title to the

destroyed building and to protect every specie of property therein and every person having an insurable interest therein, and thereby render this contract of insurance a lawful contract, and in complete compliance with this statute.

The Opinion of the Circuit Court of Appeals Overrides Both the Statute and the True Legal Meaning of the Language Used in the Contract.

The Circuit Court of Appeals gave to the words, "for account of whom it may concern," no meaning whatsoever. The construction of the contract adopted by the Circuit Court of Appeals, reads these words out of the policy. The Court, in the course of its opinion, says:

> "The phrase, 'for account of whom it may concern,' was doubtless used in the policy to make doubly certain that in case of loss the proceeds of insurance would be payable to the public authorities charged with the maintenance of the schools, whoever they might be and by whatever name they might then be known."

The public authorities were limited under the law to one of two things, (a) to insure and limit the indemnity to the interest alone which it had in the subject of insurance, or (b) to insure, as it did, the whole title and constitute itself a trustee of the indemnity for account of whom it might concern. Neither the named public authority or the supposed public authority, referred to by the Circuit Court of Appeals, owned in fee simple the land on which the subject of insurance was built, nor were they the sole owners of the subject of insurance. Simply because the named assured, or its successors, were public authorities, did not enable

them to violate the statute. If the Circuit Court of Appeals has correctly stated the object and purpose of the contracting parties, according to the true intent, spirit and meaning of their contract, then we submit, in the light of the statute, that the effect of that decision is to give force and effect to a contract unlawfully made and which the contracting parties were expressly forbidden to make, thus ignoring both the statute and the words used in the contract.

In this connection, we submit that the construction given to the contract by the Circuit Court of Appeals establishes a meaning for the contract the same as if the words, "for account of whom it may concern," had not been used at all. The named assured in this contract, as we have heretofore pointed out, was "The Board of Education of the County of Raleigh and legal representatives." The named assured in the rider to the policy was "The Board of Education of the County of Raleigh as is now or may hereafter be constituted." We submit that these two descriptions of the named assured, used in this contract of insurance, fully comprehend, by plain and unmistakable language, "the public authorities charged with the maintenance of schools, whoever they might be and by whatever name they might then be known." Why were the words, "for account of whom it may concern," used at all? They are in the contract, they have legal meaning, as we have seen, will not this legal meaning be attributed to them, or are these words to mean absolutely nothing? Is no intention to be attributed to the contracting parties from the use of these words, when they are of such frequent and ancient use and to which such uniform meaning has heretofore been given to them by the courts of this land, and especially by the highest judicial tribunal in the nation? We cannot but feel that

to so construe this contract is arbitrary and without justification in the light of the law and facts attending the contracting parties at the time the contract was made.

The Circuit Court of Appeals Adopted Erroneous Factual Premise—The Authorities Relied On Do Not Apply.

We challenge the factual premise on which the Circuit Court of Appeals based its decision. Its decision, as we have endeavored to demonstrate, fails to take cognizance of the Statutes of West Virginia and the material provisions of the instant contract and the facts and circumstances attending its execution and having done so relied and bottomed its decision on authorities having no application to the instant case.[11] We find no fault with the principle of law enunciated in these cases, they are cases of the general rule of insurance contracts, with a single named assured, with nothing appearing in the contract indicating an intention to protect any other person. Cooley's Briefs on Insurance, Volume 2, page 1282, expresses the general rule and its exception in this language:

> "The general rule is that a policy made in the name of a particular person will not protect the interest of any other person, unless the words "for whom it may concern," or their equivalent, indicate that it is intended that the interest of some other person be covered."

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[11] Thompson v. Gearheart, 137 Va. 427, 119 S. E. 67.
Harrison v. Pepper, 166 Mass. 288, 44 N. E. 222.
Clements v. Clements, 167 Va. 223, 188 S. E. 154.
In re Gorman's Estate, 321 Pa. 292, 184 Atl. 86.

The Words, "For Account of Whom It May Concern," Used in An Insurance Contract, Are Technical in Their Meaning And Comprehend Every Species of Property Held in the Res or Subject of Insurance, and When the Subject of Insurance is Real Estate, These Words Convert the Policy Into a Covenant Real and the Indemnity Follows the Title.

In the instant case the form of the policy used by the contracting parties was designed to cover every specie, title or interest held by all persons in the property covered by the policy, and to constitute The Board a trustee of the funds over and above its own indemnity, payable under it, for the benefit of all persons having any insurable interest in the property covered by the policy. The policy, as thus written, has two aspects. It establishes a legal status between The Board and the insurance company on the one part, and an equitable relation between The Board and the associate owner of the insured property on the other. The contract, when so construed, is enforceable against the insurance company for the whole value of the destroyed property, regardless of title or ownership, and as so construed, conforms to and is in complete harmony with the Statutes of the State of West Virginia. Such a construction saves this contract of insurance from invalidity on account of its being a *speculative policy* and on account of its violation of the principles of indemnity firmly fixed by the Statutes of West Virginia and the decisions of its highest court. This construction prevents this contract from being a mere gambling contract. That such a contract, construed as the Circuit Court of Appeals construed it, violates public policy and is void in its entirety, is demonstrated by the very language of the statute. The words, "for account of whom it may concern," were advisedly used in this policy for the very purpose of avoiding illegality or violating the

statute and the public policy of the State of West Virginia. With this language and this construction the policy remains a contract of indemnity, indemnity to The Board and indemnity to all persons having title or insurable interest in the subject covered by the policy. The contract of insurance having accomplished the purpose intended, by denying the insurance company of its legal defense under the sole ownership paragraph of the standard form, thus compelling the insurance company to pay the whole cash value of the destroyed building into court, should now be enforced, and The Board should be estopped from denying its trusteeship in the fund. According to the true intent, spirit and meaning of this contract, as construed by the highest courts in this nation, the indemnity now stands in the place of the building and follows in its distribution the title to the property destroyed.[12]

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[12] Hagan v. Scottish Union & National Ins. Co., 186 U. S. 423, 22 S. Ct. 862, 46 L. Ed. 1229.
Miltenberger v. Beacom, 9 Pa. St. 198.
Clyburn v. Reynolds, (S. C.) 9 S. E. 973.
Green v. Green, (S. C.) 27 S. E. 952.
Haxall's Ex'ors. v. Shippen, (Va.-1839) 10 Leigh 536, 34 Am. R. 745.
Culbertson v. Cox, 29 Minn. 309, 43 Am. R. 204, 13 N. W. 177.
Brough v. Higgins, 2 Gratt. 408, 19 Va. R. A. 423.
Crisp Co. Lumber Co. v. Lee Bridges, 187 Ga. 484, 200 S. E. 777.
Clark v. Leverett, 159 Ga. 487, 126 S. E. 258.
Welch v. London Assurance Corp. (Pa.) 151 Pa. St. 607, 25 Atl. 142.
Sampson v. Grogan, (R. I.) 42 Atl. 712, Opinion of the Court, 717.
Joyce on Insurance, (2d) Vol. 2, Secs. 964, 966, p. 2053.
Vance on Insurance, Sec. 148, p. 421.

Where Real Estate is Insured in the Comprehensive Terms Used in the Instant Policy and the Property is Involuntarily Destroyed, and the Policy Matures, Equity Will Reconvert the Indemnity Into Realty to Protect the Interests of the Different Owners of the Subject Insured, and the Money Will Stand in the Place of the Building and Be Held by Each Owner as of His Former Estate.

This principle is well recognized throughout the United States and is as old, and yet beneficial, in its operation as the jurisdiction of courts of equity. It has been utilized in every conceivable involuntary conversion of real estate into personal property, whether the involuntary conversion be under a decree of a court, the administration of estates under power of personal representatives, sales under trust deeds or trespass to real estate.[13] Some of these are cases of constructive trust, but here we have a case of express trust, expressed by the very language used

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[13] Findley v. Findley, 42 W. Va. 372 (conversion judicial sale), 26 S. E. 443.
Hawes v. Lathrop, 38 Cal. 493 (conversion of insurance fund).
Chase v. Swayne, 88 Tex. 218, 53 Am. St. R. 742, (homestead destroyed by fire).
McCoy v. Ferguson, 249 Ky. 334, 60 S. W. (2d) 931 (condemnation conversion).
Green v. Green, 50 S. C. 514, 27 S. E. 952 (conversion fire loss).
Brough v. Higgins, (Va.) 2 Gratt. 408.
Haxall's Ex'ors. v. Shippen, (Va.-1839) 10 Leigh 536, 34 Am. R. 745 (conversion fire loss).
19 Am. Jur., "Equitable Conversion," Sec. 19, p. 18.
4 Pomeroy's Eq. Jur., (5th Ed.) Sec. 1168, pp. 499-500.

in the contract of insurance.[14] It is not infrequent in its application to indemnity arising out of matured fire insurance policies, in cases where the language of the policy will warrant it. Thus where the policy is payable to the named assured, his heirs or personal representatives and the policy matures after death of the named assured and by will the insured estate is split,[15] and in the case of reversioner not in possession who insures the whole estate, his own interest, as well also as the life estate, a trust in the indemnity arises for the use and benefit of the whole estate.[16] Still other cases in jurisdictions recognizing the doctrine of trust relationship between the life tenant and the remainderman, and either insures the whole estate, the indemnity is reconverted into realty and becomes a trust.[17] Where property is conveyed to trustees for a particular purpose, with reversion upon failure of use, and the purpose fails, after the trustees erect the building, and the property in the meantime is destroyed by fire, the money will be converted into realty and follow the title upon reversion.[18] The lan-

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[14] Cooley's Briefs on Insurance, Vol. 2, p. 1265.
2 Barton's Chancery Practice, (2d) Sec. 290, p. 958.

[15] Haxall's Ex'ors. v. Shippen, (Va.-1839) 10 Leigh 536, 34 Am. Rep. 745.
Culbertson v. Cox, 29 Minn. 309, 13 N. W. 177.

[16] Brough v. Higgins, et al, (Va.-1846) 2 Gratt. 408.

[17] Clyburn v. Reynolds, (S. C.) 9 S. E. 973.
Green v. Green, (S. C.) 27 S. E. 952.
Crisp Co. Lumber Co. v. Lee Bridges, 187 Ga. 484, 200 S. E. 777.
Clark v. Leverett, 159 Ga. 487, 126 S. E. 258.

[18] Hawes v. Lathrop, 38 Cal. 493.

guage in the instant policy or contract of insurance is clear and unmistakable, when read in the light of the attending circumstances at its execution, and by previous judicial determination, by this Court, the words used undoubtedly constitute the indemnity a trust fund for the benefit of whomsoever the loss insured against, would inevitably fall, but for the insurance, and thus avoid one having but a mere right to possession for a special purpose appropriating to its sole use the proceeds of the policy as if taken in its name alone, on the valuation of the entire and unconditional title as if it were the sole owner, and by so doing convert a catastrophe into a blessing.

CONCLUSION

Your petitioner respectfully submits that the final determination by this Court of the questions of law involved in the interpretation of insurance contracts, is of the utmost importance to the rights of contracting parties in relation to insurance, so frequently and necessarily contracted in the form utilized in the instant case; as a practical matter such contracts are universally made upon forms, with riders attached, couched in previously determined legal meaning and decisions of this Court so construing such riders tends to establish a uniformity of construction throughout the United States.

The decision of the Circuit Court of Appeals herein is not only contrary to the law, as announced by this Court in its earlier decisions, and the holdings of the Supreme Court of West Virginia, but it is contrary to the express Statutes of West Virginia, applicable to cases of this character, and gives to the contract a construction and meaning

which it was the clear intent, spirit and purpose of the statutes to prohibit and avoid.

Unless the error in this decision be corrected by this Court, the effect will be to create widespread and regrettable confusion, arising out of the conflict of this decision with applicable statutes of West Virginia and the similar statutes of other states, which have adopted the New York Standard Form of Fire Insurance Policy, which contracts are so frequently and generally used and necessary to the proper conduct of modern commerce in general, and which are of the utmost importance in the proper administration of insurance business generally.

Respectfully submitted,

J. W. MAXWELL,

Counsel for Petitioner.

J. W. Maxwell,
Beckley, West Virginia.

Floyd M. Sayre,
Beckley, West Virginia.

G. Berk Lynch,
Beckley, West Virginia.

Of Counsel for Petitioner.

APPENDIX

The pertinent provisions of the West Virginia Statute, Sections 7 and 8, of Article 4, of Chapter 33, of the Official Code of West Virginia, (Michie's Code, Serial Sections 3366 and 3367), which we deem to be helpful to the Court in arriving at a conclusion in this case, are as follows:

"Sec. 3366. (7) *Form of Fire Policies.*—No fire insurance company, its officers or agents, shall make, issue or deliver for use any policy against loss by fire only, or the renewal of any such policy, on property in this State other than such as shall conform in all particulars as to blanks, size of type, context, provisions, agreements and conditions as set forth herein.

No.....

(Space for insertion of name of company or companies issuing the policy and other matter permitted to be stated at the head of the policy.)

Amount $..... Rate..... Premium $.....

In consideration of the stipulations herein named and of .....dollars premium does insure..... and legal representatives, to the extent of the actual cash value (ascertained with proper deductions for depreciation) of the property at the time of loss or damage, but not exceeding the amount which it would cost to repair or replace the same with material of like kind and quality within a reasonable time after such loss or damage, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair and without compensation for loss resulting from interruption of business or manufacture, for the term of

.....from the.....day of.....19..., at noon, to the.....day of....., 19..., at noon, against all direct loss and damage by fire and by removal from premises endangered by fire, except as herein provided, to an amount not exceeding..... dollars to the following described property while located and contained as described herein, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from fire, but not elsewhere, to-wit:

(Space for description of property.)

This policy is made and accepted subject to the foregoing stipulations and conditions, and to the stipulations and conditions printed on the back hereof, which are hereby made a part of this policy, together with such other provisions, stipulations and conditions as may be indorsed hereon or added hereto as herein provided.

In Witness Whereof, this company has executed and attested these presents.

(Space for date and for signatures and titles of officers and agent.)

Fraud, misrepresentation, etc. This entire policy shall be void if the insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

Uninsurable and excepted property. This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money, notes or securities; nor, unless

specifically named heron in writing, bullion, manuscripts, mechanical drawings, dies or patterns.

Hazards not covered. This Company shall not be liable for loss or damage caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises.

Ownership, etc. This entire policy shall be void, unless otherwise provided by agreement in writing added hereto, (a) if the interest of the insured be other than unconditional and sole ownership; or (b) if the subject of insurance be a building on ground not owned by the insured in fee simple; or (c) if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property insured hereunder by reason of any mortgage or trust deed; or (d) if any change, other than by the death of an insured, take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard); or (e) if this policy be assigned before a loss.

Other insurance. **Increase of hazard.** **Repairs, etc.** Unless otherwise provided by agreement in writing added hereto this Company shall not be liable for loss or damage occurring, (a) while the insured shall have any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or (b) while the hazard is increased by any means within the control or knowledge of the insured; or (c) while mechanics are employed in

building, altering or repairing the described premises beyond a period of fifteen days; or (d) while illuminating gas or vapor is generated on the described premises; or while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises fireworks, greek fire, phosphorus, explosives, benzine, gasoline, naphtha or any other petroleum product of greater inflammability than kerosene oil, gunpowder exceeding twenty-five pounds, or kerosene oil exceeding five barrels; or (e) if the subject of insurance be a manufacturing establishment while operated in whole or in part between the hours of ten P. M. and five A. M., or while it ceases to be operated beyond a period of ten days; or (f) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of ten days; or (g) by explosion or lightning, unless fire ensue, and, in that event, for loss or damage by fire only.

Explosives, gas, etc.

Factories.

Unoccupancy.

Explosion, Lightning.

Chattel mortgage. Unless otherwise provided by agreement in writing added hereto this Company shall not be liable for loss or damage to any property insured hereunder while encumbered by a chattel mortgage, and during the time of such encumbrance this Company shall be liable only for loss or damage to any other property insured hereunder.

Fall of building. If a building, or any material part thereof, fall except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

Added Clauses. The extent of the application of insurance under this policy and of the contribution to be made by this Company in case of loss or damage, and any other agreement not inconsistent with or a waiver of any of the conditions or provisions of this policy, may be provided for by agreement in writing added hereto.

Waiver. No one shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement added hereto, nor shall any such provision or condition be held to be waived unless such waiver shall be in writing added hereto, nor shall any provisions or condition of this policy or any forfeiture be held to be waived by any requirement, act or proceeding on the part of this Company relating to appraisal or to any examination herein provided for; nor shall any privilege or permission affecting the insurance hereunder exist or be claimed by the insured unless granted herein or by rider added hereto.

Cancellation of policy. This policy shall be cancelled at any time at the request of the insured, in which case the Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time by the Company by giving to the insured a five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand.

Pro rata liability. This Company shall not be liable for a greater proportion of any loss or damage

than the amount hereby insured shall bear to the whole insurance covering the property, whether valid or not and whether collectible or not.

Noon. Mortgage interests.

The word "noon" herein means noon of standard time at the place of loss or damage. If loss or damage is made payable, in whole or in part, to a mortgagee not named herein as the insured, this policy may be cancelled as to such interest by giving to such mortgagee a ten days' written notice of cancellation. Upon failure of the insured to render proof of loss such mortgagee shall, as if named as insured hereunder, but within sixty days after notice of such failure, render proof of loss and shall be subject to the provisions hereof as to appraisal and times of payment and of bringing suit. On payment to such mortgagee of any sum for loss or damage hereunder, if this Company shall claim that as to the mortgagor or owner, no liability existed, it shall, to the extent of such payment be subrogated to the mortgagee's right of recovery and claim upon the collateral to the mortgage debt, but without impairing the mortgagee's right to sue; or it may pay the mortgage debt and require an assignment thereof and of the mortgage. Other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreements in writing.

Requirements in case of loss.

The insured shall give immediate notice in writing, to this Company, of any loss or damage, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, stating the quantity and cost of each article and the amount claimed thereon; and,

the insured shall, within sixty days after the fire, unless such time is extended in writing by this Company, render to this Company a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: The time and origin of the fire, the interest of the insured and of all others in the property, the cash value of each item thereof and the amount of loss or damage thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish a copy of all the descriptions and schedules in all policies and if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

Appraisal. In case the insured and this Company shall fail to agree as to the amount of loss or damage, each shall, on the written demand of either, select a competent and disinterested appraiser. The appraisers shall first select a competent and disinterested

umpire; and failing for fifteen days to agree upon such umpire then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property insured is located. The appraisers shall then appraise the loss and damage stating separately sound value and loss or damage to each item; and failing to agree, shall submit their differences only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of sound value and loss or damage. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

Company's options. It shall be optional with this Company to take all, or any part, of the articles at the agreed or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within thirty days after the receipt of the proof of loss herein required; but there can be no abandonment to this Company of any property.

Abandonment.

When loss payable. The amount of loss or damage for which this Company may be liable shall be payable sixty days after proof of loss, as herein provided, is received by this Company and ascertainment of the loss or damage is made either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as herein provided.

Suit. No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity unless all the require-

ments of this policy shall have been complied with, nor unless commenced within twelve months next after the fire.

Subrogation. This Company may require from the insured an assignment of all right of recovery against any party for loss or damage to the extent that payment therefor is made by this Company.

Standard Fire Insurance Policy of the State of West Virginia

Expires .....
Property .....
Amount - - - $.....
Premium - - - $.....
.....
No.....

It is important that the written portions of all policies covering the same property read exactly alike. If they do not they should be made uniform at once. (1907, c. 77, sec. 68; Code 1923, c. 34, sec. 68; 1923, c. 18, sec. 68.)

Sec. 3367. (8) *Additional Matter Which May Be Inserted In Fire Policy.*—No other or different provision, agreement, condition or clause shall be in any manner made a part of such contract or policy or indorsed thereon or added thereto or delivered therewith, except as follows, to-wit:

(a) There may be printed at the head of said policy in the space indicated by the words "space for insertion of name of company or companies issuing the policy and other matter permitted to be stated at the head of the policy" the name of the company, or companies, issuing the policy;

the location and place of business thereof; the date of incorporation or organization thereof; whether said company, or companies, are stock or mutual corporations; and such device or devices as the company, or companies, issuing said policy shall desire;

(b) There may be printed at the end of the first page of said policy in the space indicated therefor by the words "space for date and for signatures and titles of officers and agent," the names and titles of the officers executing and attesting the policy and the words "but this policy shall not be valid until countersigned by the duly authorized agent of the company at....." (or the "manager" in place of the word "agent") and the words "countersigned at.....this .....day of.....," followed by a blank space for the signature of such duly authorized agent or manager, and the word "agent" or "manager";

(c) There may be printed in the space indicated by the words "space for description of property," or added to the policy at such space by agreement in writing thereon or by rider attached thereto the following: (1) Descriptions and specifications, by schedule or otherwise, or the property covered by the policy; (2) The extent of the application of insurance under the policy; (3) The extent of the contribution to be made under the policy in case of loss or damage; (4) Any other matter necessary clearly to express all the facts and conditions of insurance on any particular risk. Provided, however, That no such agreement or rider shall be inconsistent with or a waiver of any of the conditions or provisions of the standard fire insurance policy hereby established, except that in the case of a mortgagee not named in the policy as the insured, such provisions may be added as shall not be inconsistent with or a waiver of

any of the provisions of the said standard policy relating to mortgage interests, but if so added, shall include the provisions of a standard rider or indorsement relating to such interest the form of which shall have been approved by the insurance commissioner and filed in his office as hereinafter provided;

(d) There may be added to the policy, with the approval of the insurance commissioner, any provision which any company issuing a policy is required by law to insert in its policies, not in conflict wth the provisions of such "standard fire insurance policy." All such provisions shall be printed in a group apart from the other provisions, agreements or conditions of the policy under separate title as follows: "Provisions required by law to be stated in this policy";

(e) If the policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations may, with the approval of the insurance commissioner, be written or printed upon, attached or appended to the policy, upon the third page of such standard policy, but shall be preceded by the words "This policy is issued by a mutual company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance of which the following shall apply to and form a part of this policy";

(f) Contracts for temporary insurance may be made for a period not exceeding fifteen days, which shall be deemed to include all of the provisions of the standard policy with such agreements and riders in writing added thereto as may be necessary to effect valid insurance of the described property and such other agreements not incon-

sistent with or a waiver of any condition or provision of the standard policy as may be expressed in such contract, except that the cancellation clause of the standard policy shall be superseded by the provisions of any such temporary contract regulating cancellation or termination of insurance thereunder, and except that where any such contract for temporary insurance shall specify the hour of the day when liability shall commence, such statement of time shall supersede the provisions of such standard fire insurance policy to the contrary, and such statement shall be deemed to refer to standard time at the place of loss or damage;

(g) The standard policy provided for herein need not be used for effecting reinsurance between insurers;

(h) There may be printed upon the filing back of said policy the name of the company or companies issuing the policy; the location and place of business thereof; statement of the amount of capital thereof; such device or devices as the company or companies issuing said policy shall desire, and if the policy be a combination policy, such distinctive title therefor as may be authorized for use as herein provided. There may also be printed, stamped or otherwise indorsed upon the filing back of said policy the name with the word "agent" or "agents" and place of business of any insurance agent or agents. The words at the top of the filing back of said policy, "standard fire insurance policy of the State of West Virginia" may be changed by the use of the word "States" instead of "State" and by adding after the words "West Virginia" the names of any states in which the said policy form shall be standard when the policy is issued;

(i) There may be printed upon said policy form, else-

where than upon the first and second pages or the filing back thereof, the names of the officers and directors of the company or companies issuing the said policy, and any form providing for assignment of interest or removal, and any blank form of receipt, approved by the insurance commissioner.

The insurance commissioner, either in person or by any one or more competent and disinterested persons specially appointed by him for that purpose, shall have access to and may at any time examine the books, papers and documents of any fire insurance corporation doing business in this State, or of any corporation, association or bureau maintained for the purpose of suggesting, approving or making rates to be used by more than one underwriter for insurances on property located in this State, for the purpose of determining the number and extent of use of any riders, indorsements, clauses, permits, forms or other memoranda attached to and made a part of any fire insurance contract relating to property located in this State; and after such examination and inspection such insurance commissioner may determine that the use of any such rider, indorsement, clause, permit, form or other memoranda is so extensive that there should be in his judgment a standard form thereof, and he shall thereupon prepare and file in his office such standard form of rider, indorsement, clause, permit, form or other memoranda, and thereafter no fire insurance corporation shall attach to any such standard policy of insurance, any rider, indorsement, clause, permit, form or other memoranda covering substantially the same agreement provided for by such standard rider, indorsement, clauses, permit, form or other memoranda except it be in the precise language of the form so filed by the insurance commissioner. Forms of

riders, indorsements, clauses, permits, forms or other memoranda to be attached to and made a part of fire insurance contracts relating to property located in this State may be presented for filing in the office of the insurance commissioner by any corporation, association or bureau maintained for the purpose of suggesting, approving or making rates to be used by more than one underwriter for insurances on property located in this State, and when approved and filed by such insurance commissioner, shall thereupon become standard forms of riders, indorsements, clauses, permits, forms or other memoranda and their use shall be required as hereinbefore provided. Whenever, in the judgment of the insurance commissioner, there shall be no further necessity for requiring the use of any standard form of rider, indorsement, clause, permit, form or other memorandum in the precise language theretofore required, he may give notice in writing of such determination, to each fire insurance corporation doing business in this State, and to each such corporation, association or bureau maintained for the purpose of suggesting, approving or making rates, as aforesaid, and thereafter the use of such standard form shall not be required as herein provided.

Appropriate forms of supplemental contract or contracts whereby the property described in such policy shall be insured against one or more of the risks specified in section one (sec. 3360) of this article, in addition to the risk of direct loss or damage by fire may be approved by the insurance commissioner, and their use in connection with a standard fire insurance policy may be authorized by him. Provided, however, That nothing in this section or the preceding section shall relate or apply to farmers' mutual insurance companies organized under article five (sec. 3382 et seq.), of this chapter. The insurance com-

missioner may, upon complaint, after hearing, reduce any fire insurance rate that is excessive. (1907. c. 77, sec. 68; Code 1923, c. 34, sec. 68; 1923, c. 18, sec. 68.)"

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In The

Supreme Court of the United States

OCTOBER TERM, 1945

No.

WINDING GULF COLLIERIES, Petitioner,

VS:

THE BOARD OF EDUCATION OF THE COUNTY OF RALEIGH, WEST VIRGINIA, and ALLEMANNIA FIRE INSURANCE COMPANY. Respondents.

BRIEF OF RESPONDENT, THE BOARD OF EDUCATION OF THE COUNTY OF RALEIGH, WEST VIRGINIA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI HEREIN.

To The Honorable, The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

We submit that the petition for a writ of certiorari herein should be denied for the fol-

NOTE: Numerals in brackets (-) refer to pages of Transcript of Record.
NOTE: Bold Type in brief represents emphasis by counsel.

lowing good and sufficient reasons:

FIRST:

Failure of petitioner to comply with Rule 12, Paragraph 1 and Rule 38 of the Rules of this court.

The petitioner prays that a writ of certiorari be issued by this Court (P-15) to review the decision of a Circuit Court of Appeals.[1] Neither the petition nor the brief in support of it show that any special or important reason exists for the granting of the writ by this court. The petition and supporting brief show that no federal question is involved and that the decision (137) about which petitioner complains has given proper effect to the applicable decisions of this court.

The decision was not rendered in conflict with any decision of another Circuit Court of Appeals; neither does the decision decide any important question of local law in a way that conflicts with the applicable local decisions.

The petition attempts to invoke jurisdiction in this court under Section 24(a) of the Judicial Code as amended by the Act of February 13, 1925, (28 U.S.C.A., Sec. 347), by

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[1]Board of Education etc. vs: Winding Gulf Collieries, 152 F.(2d) 382.

stating that said decision does not properly construe the law in the light of the uniform policy fire insurance law of the State of West Virginia (P. 2, etc.). This question was not presented to either the District Court or said Circuit Court of Appeals, but was first raised by petitioner by its petition to the Circuit Court of Appeals for a rehearing. (148).

SECOND:

The decision of the said Circuit Court of Appeals shows that the court has clearly applied familiar principles of insurance law as formerly propounded by this court, other Circuit Courts of Appeals, the Supreme Court of Appeals of West Virginia, and other Courts of the land.[1]

UNWARRANTED STATEMENTS IN PETITION.

The petition (P. 6-7) states:

"Under the call for the election it was

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[1]Hagen v. Scottish Ins. Co., 186 U. S. 423
New Orleans, etc. v. W. R. Grace and Co., 26 F. 2d 967
Board v. Ins. Co., 116 W. Va. 503
Thompson v. Gearheart, 137 Va. 427,
City of Norwich, 118 U. S. 468,
And other cases cited in the decision.

provided that the school building would be located at or near the Village of Winding Gulf. The officials of The Board met with the officials of Winding Gulf Colliery Company, predecessor of Winding Gulf Collieries, and they then and there had a **verbal agreement** after inspecting the premises and specifications of the contemplated building, that **such building** would be located upon lands of Winding Gulf Colliery Company, * * *"

"This parol agreement was carried into a written agreement by a deed dated the 23rd day of August, 1924, (R. 18) * * *"

There is no foundation in the record for such statements and no such assertions were made by Winding Gulf Collieries either in the District Court or the Circuit Court of Appeals.

The petition (P. 7-8) also states:

"Winding Gulf Collieries, by deed dated 15th day of August, 1929, succeeded to the rights of Winding Gulf Colliery Company (R. 124.)"

The foregoing statement is not correct because the record (54) shows that Winding Gulf Colliery Company, predecessor in title

to Winding Gulf Collieries, the petitioner, excepted from said conveyance all the property, rights and privileges granted to this respondent's predecessor by deed dated August 23, 1924. This exception was the land on which the school building was located and which was destroyed by fire and covered by the insurance in question in this case.

Other unwarranted statements contained in said petition will be hereinafter noted in the "ARGUMENT" contained in this brief.

STATEMENT OF FACTS.

Prior to August 23, 1924, The Board of Education of Slab Fork District determined that it was necessary to construct certain high schools in that district and a bond election was held for that purpose. The bond election carried and on August 23, 1924, Winding Gulf Colliery Company granted and conveyed to The Board of Education of Slab Fork District 0.517 of an acre of surface land (18). This deed is recorded in the County Clerk's office of said Raleigh County in Deed Book No. 90, at page 131 (24).

By the acts of the West Virginia Legislature for the year 1933, district boards of education were abolished in Raleigh County and The

Board of Education of the County of Raleigh was made successor thereto (42). This respondent thereby succeeded to all the rights of said district boards.

Said deed provided that the tract of land conveyed as aforesaid would revert to the grantor, Winding Gulf Colliery Company and not the petitioner, upon cessation of use thereof by respondent for school purposes (21). The petitioner bases its claim on abandonment and reversion of the land after the fire.

On the 15th day of August, 1929, (52), said Winding Gulf Colliery Company granted and conveyed numerous tracts of real estate to petitioner, excepting and reserving (54) "all property, rights and privileges heretofore conveyed by the said Winding Gulf Colliery Company by the following deeds dated and recorded in the office of the Clerk of the County Court of Raleigh County, West Virginia, to-wit:

* * * *

(13) Deed to Board of Education of Slab Fork District, dated August 23, 1924, and recorded in Deed Book 90, page 131." (54). This reference was to the deed conveying the land in question (24) from Winding Gulf Colliery Company to petitioner, Winding Gulf Collieries.

After the respondent's predecessor in title acquired the tract of land, as aforesaid, it constructed a school building thereon which was used continuously for school purposes until destroyed by fire on January 4, 1944.

On December 1, 1943, the respondent, pursuant to its statutory authority, caused the school building to be insured by the Allemmania Fire Insurance Company and other companies for a period of three years (24), and paid all the premiums thereon with public funds.

The policy covered (26) all physical structures and the contents thereof and the interest of the insured and held by the insured for educational purposes and purposes necessary or incidental thereto on the tract of surface land in question and on lands not owned in fee simple by the assured in Raleigh County.

The total amount of the loss was adjusted with this respondent at the sum of $67,201.02 (28). The adjusted amount for the Allemmania Fire Insurance Company to pay is the sum of $4,771.27 (35), but it is stipulated and agreed (28) that other insurance companies are severally liable for other amounts (34-38) making up said total adjusted loss and that

payment thereof will be governed by the final disposition of this case.

Other pertinent facts necessary to a determination of this case are stated in the opinion of the Circuit Court of Appeals (137).

ARGUMENT.

The petitioner takes the definite position that the record presents five questions, all of which relate to and have reference to the sole ownership clause contained in the statutory form of a West Virginia fire insurance contract. This clause (Petitioner's Appendix 45) is as follows:

> "This entire policy shall be void, unless otherwise provided by agreement in writing added hereto, (a) if the interest of the insured be other than unconditional and sole ownership; or (b) if the subject of insurance be a building on ground not owned by the insured in fee simple; or (c) if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property insured hereunder by reason of any mort-
>
> OWNERSHIP, Etc.

gage or trust deed; or (d) if any change, other than by the death of an insured, take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard); or (e) if this policy be assigned before a loss."

The Supreme Court of Appeals of West Virginia has decided a number of times that this clause may be waived by the insurer.[1]

In the Melton case the court stated the law to be that "the legislature has provided a standard uniform policy for all fire insurance in this state, one provision of which is the requirement that a building be situate upon land owned in fee simple by the insured, unless it be provided otherwise by agreement in writing added or endorsed on the policy. The **law does not preclude one having less than a fee simple title to land** or one having a building even on

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[1]Kirk, et al v. Queens Ins. Co., 126 W. Va. 213, at page 218,
Hamlet v. Am. Fire Ins. Co., 107 W. Va. 687, Syl. 2,
Melton v. Aetna Ins. Co., 110 W. Va. 73, at page 77,
Hawkins v. Southwestern Mutual Fire Ins. Co., 80 W. Va. 773.

leased premises **from obtaining insurance;** but it requires that the insured put the company on notice in such instances."

There is no contention on the part of the insurance company that the contract of insurance in this case did not comply with the statute. In fact the whole contract is set out at length and states that "loss, if any, under this policy shall be adjusted with and held payable to the Board of Education of the County of Raleigh." (26). It covered property "occupied for educational purposes and purposes necessary or incidental thereto **while located on premises owned, occupied, leased or used** by the assured in Raleigh County, West Virginia." (27).

Special conditions of the policy pertinent in this case are as follows:

SPECIAL CONDITIONS

"This insurance shall not be invalidated by the existence of any mortgage or trust deed or other encumberance that may now or hereafter be in force affecting the property above described, nor because of any foreclosure proceedings being commenced or notice given of sale of any property covered by this policy by

virtue of any mortgage, trust deed, or other encumberance. The Board of Education of the County of Raleigh as is now or may hereafter be constituted **shall be deemed the owner of the property herein named,** described and covered by this policy, and no defect in the title to such property shall invalidate this policy in whole or in part.

Should any of the within described property be situate on lands not owned by the assured in fee simple this insurance shall not be affected thereby.

This policy shall not be affected by the failure of the insured to comply with any of the warranties or conditions endorsed hereon in any portion of the premises over which the insured has no control."

INTENTION OF THE PARTIES.

The Circuit Court of Appeals found **as a matter of fact** that "there was and could have been no intention on the part of the Board of Education to protect the Collieries when it insured the school building in question" (143). The intention of the one obtaining the insurance to cover the interest of another in the

property is always necessary before the insurance will extend to and cover the other party.

A policy of insurance must be interpreted according to the apparent object and plain intent of the parties thereto.[1]

In the Thompson case the Supreme Court of Appeals of West Virginia, at page 554, said:

> "In ascertaining the intention of the parties to an insurance contract, the test is what a reasonable person in insured's position would have understood the words of the policy to mean."

In the Pilgrim Laundry case the Circuit Court of Appeals (4th Cr.) said:

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[1]Kanawha Investment Co. v. Hartford Steam Boiler Inspection Co., 107 W. Va. 555, Syl. 3,
Thompson v. State Auto Mutual Ins. Co., 122 W. Va. 551 at page 554,
Pilgrim Laundry etc. v. Federal Ins. Co., 140 Fed. (2d) 193,
Aetna Ins. Co. v. Boon, 95 U. S. 117, 24 U. S. (L. Ed.) 395,
Clements v. Clements, 188 S. E. 154 (Va.) Anno. 126 A. L. R. 349,
Thompson v. Gearheart, 119 S. E. 67, 35 A. L. R. 36.

"Irrespective of any other rules of construction the real interest and agreement of the parties **and what they intended** and meant when they entered into the contract of insurance is what must govern the court in determining the respective liabilities."

Certainly the words contained in the policy with reference to whom the loss should be paid and those stating that the Board of Education of the County of Raleigh "shall be deemed the owner of the property herein named, described and covered by this policy," were meant to cover the property of this respondent and insure its interest therein.

The petitioner insists that fire insurance is a property interest which attaches itself to the thing insured and goes with it when transferred. The City of Norwich[1] decided in 1886, is the leading case on that question and has been consistently followed. One of the latest cases following it is Donald T. Wright.[2] From the opinion in the City of Norwich at page 494, we quote as follows:

"This view is corroborated by ref-

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[1]The City of Norwich, 118 U. S. 468.

[2]Donald T. Wright, 30 F. Sup. 610.

erence to a rule of law which we suppose to be perfectly well settled, namely, that the insurance which a person has on property is not an interest in the property itself, but is a collateral contract, personal to the insured, guaranteeing him against loss of the property by fire or other specified casualty, but not conferring upon him any interest in the property. That interest he has already by virtue of his ownership. If it were not for a rule of public policy against wagers, requiring insurance to be for indemnity merely, he could just as well take out insurance on another's property as on his own, and it is manifest that this would give him no interest in the property. He would have an interest in the event of its destruction or non-destruction; but no interest in the property. A man's interest in property insured is so distinct from the insurance, that unless he has such an interest independent of the insurance, his policy will be void."

"So where property is sold, the insurance does not follow it, but ceases to have any value, unless the insurer consent to the transfer of the policy to the

grantee of the property. In other words, the contract of insurance does not attach itself to the thing insured, nor go with it when it is transferred."

In the well considered case of Frank Brownell vs. Board of Education,[1] similar in fact and principle to the instant case, the court follows the case of The City of Norwich.[2] In the Brownell case it was contended that "Money accruing on a policy of insurance, where the loss has occurred subsequent to the execution of the contract, will, in equity inure to the benefit of the vendee; the vendor still retaining his character as trustee, and the insurance money in his hands representing the property that has been destroyed." The court in its opinion says of the contention and the reasons there for that:

> "These reasons may savor of laymen's ideas of equity, but they are not law– Insurance is a mere personal contract to pay a sum of money by way of indemnity to protect the interest of the insured. In common parlance the buildings are in-

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[1]Frank Brownell vs. Board of Education, 239 N. Y. 369, 146 N. E. 630, 37 A.L.R 1319.
[2]The City of Norwich, 118 U. S. 468.

sured; but everyone who stops to consider the nature of the insurance contract understands that they are not. Both in the forum and the market place it is known that the insurance runs to the individual insured, and not with the land. The vendor has a beneficial interest to protect, i.e., his own. The vendee has an insurable interest and may protect himself. The trustee as such has no insurable interest, and can only act for the cestui que trust. Plaintiff may not have the insurance money collected by defendant. It is not a part of the res bargained for, and no trust relaxation exists in regard to it."

Counsel for petitioner takes the position that the phrase, "for on account of whom it may concern," appearing in the policy, attaches the contract of insurance to the thing insured and follows it in the hands of subsequent purchasers, which is the same position that counsel took in the District Court and the Circuit Court of Appeals. Their position in that regard is fully discussed in the unanimous decision of said Circuit Court (137).

We invite this court's attenton to the fact that this case was submitted to both the Dis-

trict Court and the Circuit Court of Appeals for final decision on the pleadings and stipulation of facts; that the petitioner bases its claim on three conditions subsequent to the loss. These conditions are:

(1) Cessation of use for school purposes.

(2) Abandonment. (the respondent contends that the stipulations of fact do not constitute abandonment.)

(3) Reversion.

The rights of the parties to the proceeds of a fire insurance contract are fixed at the time of the loss.[1]

We submit that the Circuit Court of Appeals was impressed with the fact that this is an equity case and that the petitioner does not

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[1]John A. Sheppard Admr. vs. Peabody Ins. Co. 21 W. Va. 368,
Hooper vs. Robinson, 98 U. S. 528,
Ins. Co. vs. Stinson, 103 U. S. 25,
Ins. Co. vs. Jass, 36 Fed. (2d) 9,
Quarrier vs. Peabody Ins. Co., 10 W. Va. 507,
Colby vs. Ins. Co., 37 W. Va. 789, 17 S. E. 303,
B. and L. Assn. vs. Ins. Co., 113 W. Va. 62, 166 S. E. 841,
Crook vs. Hartford Fire Ins. Co. 178 S. E. 254, Syl. Point 5.

have any equitable claim. There are legal reasons why the proceeds of this fire loss should not be decreed to the petitioner.

(1) The interest which the petitioner claims in the reversion is not the petitioner's interest. It is the interest of the petitioner's vendor, Winding Gulf Colliery Company (54).

(2) The West Virginia statute[1] in effect on the 23rd day of August, 1924, governing a school board's disposition of property was the following:

> "SALE OF SCHOOL PROPERTY–It shall be the duty of every district board of education to ascertain, at the beginning of each school year, the physical condition of all school buildings in its district and the necessity of the same for school purposes and such buildings as, in the judgment of the board, are properly located and are suitable or can with reasonable expense be rendered suitable for school purposes, shall if necessary for carrying on the schools, be retained; **all other buildings** together with the lands held in connection therewith,

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[1]Barnes' West Virginia Code Annotated, 1923, Chapter 45, Section 48.

shall with the consent of the county superintendent of schools be sold at public auction to the highest responsible bidder, by the board of education on proper legal notice and on such terms of sale as the board may order, and the proceeds of such sale shall be placed to the credit of the building fund of the district; provided, that in rural districts the grantor of such lands, his heirs or assigns, shall have the right, at such sale to purchase said land, exclusive of mineral rights, and buildings thereon at the same price for which it was sold, plus legal interest. Said board, with the consent of the county superintendent and by the same method prescribed for the sale of school buildings and lands, may also lease for oil or gas or other minerals any lands or school sites owned in fee by it, the rental or other proceeds of any such lease to be placed to the credit of the new building fund of the district."

The statute above quoted, fixing the powers of the respondent in its acquisition and disposition of property for school purposes was specifically recognized in the deed to this respondent's predecessor by the grantor stip-

ulating against liability for damage to buildings occasioned by mining (21). The stipulation recognized the respondent's statutory right to sell or remove buildings upon cessation of use for school purposes.

The district court gave much weight to the case of Board of Education for Jefferson County et al, v. Littrell, et al.[1] In that case the Kentucky statute provided "any reversionary interest in any land now used as a site for a school house shall not deprive the district of the school house or other improvements thereon". In that case the deed or contract under which the school board claimed and acquired its title was executed in the year 1888. The statute in question was enacted in 1893.

The Kentucky court recognized the well established rule "that the law which subsists at the time and place of making a contract enters into and forms a part of it as if it were expressly referred to or incorporated in its terms", but held that the statute was not applicable because it was not in effect at the time of the conveyance and to read the statute into the contract or conveyance would be

[1]Board of Education for Jefferson County, et al vs. Littrell et al (Ky.), 190 S. W. 4469.

violative of the constitutional provision against impairing the obligation of a contract.

The Supreme Court of Ohio,[1] in construing a statute similar to the West Virginia statute, supra, denied injunctive relief based on a clause in a deed of conveyance which read as follows: "It is hereby agreed and understood between the grantors and grantee that if at any time the premises herein described shall cease to be used for school purposes, the same shall at once vest in said grantors, their heirs and assigns forever".

The court held that the reversionary clause in the deed did not pass title to the **school building;** that the school building did not revert to heirs of the grantors; that it would be ultra vires on the part of the school board to convey public property except in conformity with the statute; that the school building could only be disposed of by express statutory authority; that at the time of the conveyance, the grantors were charged with knowledge of the provisions of the Ohio statute defining the statutory powers of the board, and that property devoted to public use could only be dis-

[1]Schwing v. McClure, et als (Ohio), 166 N. E. 230.

posed of in conformity with the statute.

This Court and the Supreme Court of Appeals of West Virginia have repeatedly held that contracts ultra vires and in violation of statutes and court decisions are against public policy and void.[1]

The Supreme Court of Appeals of West Virginia has constantly held[2] that **a board of education is a quasi public corporation existing only under statute, having only the powers given by statute, and such implied powers as are absolutely necessary to execute such express powers,** and that an unauthorized or an illegal contract executed by a public corpora-

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[1]Trans-Missouri Freight Assn., 58 Fed. 58,
Swan v. Swan, 21 Fed. 299,
Vidal v. Guarb's Executors, 73 U. S. 127,
Hartford Fire Ins. Co. v. Chicago M. and St. P. Ry. Co., 175 U. S. 91,
LeMasters v. Board of Education of Grant District, 105 W. Va. 81, 141 S. E. 515.

[2]Herald v. Board of Education, 65 W. Va. 765, 65 S. E. 102,
Honaker v. Board of Education of Pocatalico District, 42 W. Va. 170, 24 S. E. 544,
Dooley v. Board of Education of Cabin Creek District, 80 W. Va. 648, 93 S. E. 766.

tion is incapable of enforcement; that it is absolutely void and neither the doctrine of estoppel nor ratification can be invoked to maintain it.

The Supreme Court of West Virginia has also specifically decided that the power of a board of education of the state to take out insurance is strictly limited.[1] Assuming that petitioner had a reversionary interest in the building at the time of the loss, yet respondent had no power, if it had desired to do so, to insure such an interest.

The Circuit Court of Appeals for the Second Circuit, in the case of **New Orleans, etc. v. W. R. Grace and Co.,** supra, clearly stated the law with reference to the intent of the party effecting the insurance to be as follows:

> "Where language of policy taken out 'on account of whom it may concern,' when read in the light of existing circumstances, shows that the person claiming the benefit **was not such a person as those effecting the policy had in contemplation,** his claim will be disallowed, though he might be within the description."

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[1]Board of Education v. Ins. Co., 116 W. Va. 503.

In reading the policy as a whole, in our case it is clear that this respondent at the time it obtained the insurance had no intention to insure any interest in the property destroyed by fire except the interest of the public which it represented.

CONCLUSION.

The objection of petitioner to the Circuit Court's application of the rule in the cases of New Orleans and South American S. S. Co. v. W. R. Grace and Co., supra, decided by the Circuit Court of Appeals for the Second Circuit and Hagan v. Scottish Union and Nat. Ins. Co., supra, decided by this court, is untenable. The decision of which petitioner complains is in conformity with the holdings in those cases.

Had the conditions subsequent, cessation of use for school purposes, abandonment and reversion upon which the respondent bases its claim, preceded the loss without a transfer of the insurance contract by the insurer to the respondent, it can be readily seen that under the express terms of the contract that there would have been no insurance on the building at the time of the loss.

Under the decision of The City of Norwich,

supra, the insurance contract would also have been terminated. Thus, it clearly follows that the petitioner is asking this Honorable Court to revolutionize the insurance laws of the United States and render the purpose and intent of all insurance contracts now in effect under existing laws, a nullity.

We, therefore, respectfully submit that the relief prayed for in the petition should be denied.

CLAY S. CROUSE and
GROVER C. TRAIL,
Counsel for Respondent,
The Board of Education of
the County of Raleigh,
West Virginia.

MAY 8 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 1074

WINDING GULF COLLIERIES, *Petitioner*,

vs.

THE BOARD OF EDUCATION OF THE COUNTY OF RALEIGH, WEST VIRGINIA, and ALLEMANNIA FIRE INSURANCE COMPANY, *Respondents*.

REPLY BRIEF ANSWERING BRIEF OF RESPONDENT, THE BOARD OF EDUCATION OF THE COUNTY OF RALEIGH, WEST VIRGINIA, FILED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

J. W. MAXWELL,
Beckley, West Virginia,
Attorney for Petitioner.

FLOYD M. SAYRE,
J. W. MAXWELL,
G. BRAX LYNCH,

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THE BOARD OF EDUCATION OF THE COUNTY OF RALEIGH, WEST VIRGINIA, and ALLEMANNIA FIRE INSURANCE COMPANY, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

FOREWORD.

Because of the deceptive presentation of the facts attending the case, as well also as certain distorted and in-

correct applications of well recognized principles of law, as the same are stated in respondent's opposition brief, we deem it our duty to this Court to direct attention to these material and misleading aspects.

CONCERNING STATEMENT OF FACTS ASSERTED IN RESPONDENT'S BRIEF.

Under the heading, "UNWARRANTED STATEMENTS IN PETITION," the respondent quotes in its brief, a garbeled excerpt from a paragraph of the petition for certiorari, filed herein, as follows: * * * "The officials of The Board met with the officials of Winding Gulf Colliery Company, predecessor of Winding Gulf Collieries, and they then and there had a verbal agreement, after inspecting the premises and specifications of the contemplated building, that such building would be located upon lands of Winding Gulf Colliery Company, * * *". Then they say, "There is no foundation in the record for such statement and no such assertions were made by Winding Gulf Collieries either in the District Court or the Circuit Court of Appeals." This is a distortion of the facts. Contrary to respondent's statement, the assertion was most emphatically made, both in the District Court and the Circuit Court of Appeals. The District Court in its finding of fact, (R. 93) for all practical purposes, stated this fact as we, in our petition stated it. In our brief filed in the Circuit Court of Appeals, under the title, "Statement of

Facts," we set forth in clear and unmistakable language, the factual situation, which respondent now here says was never made.[1]

We direct the Court's attention to the fact that this case was submitted for final decision upon an agreed statement of facts. (R. 98-104). It was heard in the lower court and, necessarily, upon appeal, by express agreement, by stipulation of the parties, among other things, to the effect that the allegations in the pleading which were not traversed

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[1]The statement of the disputed fact in our brief filed in the Circuit Court of Appeals is in these words:

"The Board sought a site on which to build the contemplated building. The plans for the building contemplated were drafted and The Board of Education of Slab Fork District exhibited these plans to the officials of the Winding Gulf Colliery Company, immediate predecessor to defendant, Winding Gulf Collieries.

The Winding Gulf Colliery Company, having seen the plans and ascertained the character of building contemplated, agreed to furnish the site on its lands. Pursuant thereto, on the 23rd day of August, 1924, the Winding Gulf Colliery Company executed a deed to The Board of Education of Slab Fork District, for the use by The Board of approximately one-half acre of surface land, a copy of which deed is exhibited with Winding Gulf Collieries' answer. This deed was executed upon the consideration of and 'especially subject to' a covenant in said deed as follows:" (Here the reversionary clause was quoted).

would be considered by the court as established.[2] Paragraph 1-A (R. 61) of the amended and supplemental answer of the petitioner affords the supporting facts on which the questioned statement was made. There was no pleading traversing the allegations of Paragraph 1-A of the amended and supplemental answer. Abundant foundation for the foregoing criticized statement will be found in that paragraph, which we reproduce in the footnote.[3] We feel and submit that

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[2]The exact stipulation is as follows:

"The case shall be submitted for final decision on the merits in the District Court of the United States, for the Southern District of West Virginia, upon the bill of interpleader and exhibits therewith filed, the answer of The Board of Education of the County of Raleigh and exhibits therewith filed, the original and amended answer of Winding Gulf Collieries and exhibits therewith filed. Said answers, respectively, shall be deemed to be traversed only on the allegation of fact in so far as the allegations of the answers of the claimants conflict respectively, and as to such conflict only, the same shall be deemed to be traversed."

[3] "1-A.

And now by way of amendment and for further answer to said bill of interpleader, this respondent says that before the execution of the deed described in Paragraph 1 herein, on, to-wit, the 26th day of April, 1924, and at a regular meeting of The Board of Education of Slab Fork District in the County of Raleigh, an order was made and entered of record authorizing a vote to be taken by the legal voters of Slab Fork District of Raleigh County, West Virginia, upon the question of the issuance and sale of $130,000.00 of bonds of said district, for the purpose of determining whether or not said bonds should be issued in contemplation of the establishment in said district, among other things, of 'a graded, junior high school and senior high school

there was and is no misstatement in the petition, as indicated by this quotation, and that the quotation contained

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building to be constructed, furnished and equipped in or near the Town of Winding Gulf in said district, and, if necessary, suitable grounds to be purchased on which to place the same;' that said election was accordingly called and said question was submitted to a vote of the people of Slab Fork District on the 27th day of May, 1924; that at said election sixteen hundred (1600) votes were cast in favor of the issuance of said bonds and seven hundred eighty-six (786) votes were cast against the issuance of said bonds, and at a subsequent meeting of said Board of Education, to-wit, on the 2nd day of June, 1924, said vote was duly canvassed by said Board of Education in all respects in manner and form as provided by law and the result thereof was duly and legally determined, as hereinbefore alleged, and said bonds were thereupon duly authorized and directed by said Board of Education to be sold, and pursuant thereto and in accordance therewith, the same were thereafter and before the 23rd day of August, 1924, as this respondent is advised and upon such information alleges the fact to be duly sold; that the lands described in Paragraph I hereof are situated 'in or near the Town of Winding Gulf' in said Slab Fork District, and conformed to and with the place designated for the location of such high school described in the call for such said bond election; and that at the time of the execution of said deed described in said Paragraph I, it was the intent, both of the grantor and the grantee, as this respondent is advised and upon such information alleges the fact to be, to build and construct upon said lands said building in accordance with and pursuant to said bond election and to establish thereon

in petitioner's brief is a fair and truthful short statement of the inference to be drawn from the answer of petitioner.

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said high school building and devote the same to high school purposes for said Slab Fork District; that the establishment and construction of such said high school building on said lands and the maintenance of such high school therein and thereon, together with the reversionary clause in said deed contained, was in fact the motivating cause and only consideration for the execution of said deed of conveyance, and this respondent is advised and upon such information alleges the fact to be, that the design and plan of said building had theretofore then been made and both the grantor and the grantee to said deed of conveyance were then, and before the execution and delivery of said deed, cognizant of the kind and character of building contemplated and intended to be built and constructed thereon, as well as the uses and purposes to which the same was to be devoted; that it was, at the date of the execution of said deed, the intent, spirit and purpose of both the grantor and the grantee to use said lands for such said high school for the constituents of said Board of Education, and this respondent is advised and upon such information alleges the fact to be, that the maintenance and use of said building was the free school purposes referred to and contemplated by the language used in said deed of the 23rd day of August, 1924, and described in Paragraph 1 hereof."

THE ERRONEOUS AND DECEPTIVE CONSTRUCTION PLACED ON THE DEED OF AUGUST 15, 1929,—WINDING GULF COLLIERY COMPANY TO WINDING GULF COLLIERIES.

Under the same heading of "UNWARRANTED STATEMENTS IN PETITION," respondent quotes from pages 7 and 8 of our petition for certiorari:

> "The petition (P. 7-8) also states:
>
> 'Winding Gulf Collieries, by deed dated the 15th day of August, 1929, succeeded to the rights of Winding Gulf Colliery Company (R. 124).'
>
> The foregoing statement is not correct because the record (54) shows that Winding Gulf Colliery Company, predecessor in title to Winding Gulf Collieries, the petitioner, excepted from said conveyance all the property, rights and privileges granted to this respondent's predecessor by deed dated August 23, 1924. *This exception was the land on which the school building was located and which was destroyed by fire and covered by the insurance in question in this case.*" (Emphasis ours).

The emphasized part of the foregoing statement is a demonstrable false construction of the deed referred to, as we shall show from the provisions of the deed itself. It is, undoubtedly, the purpose and intention of the foregoing emphasized language, to leave the inference that the deed of August 15, 1929, excepted and reserved to petitioner's predecessor in title the reversionary interest under which the petitioner claims in this proceeding. If there could be any doubt of this, they make their intention clear on page 18 of their brief, in this language:

> "(1) The interest which the petitioner claims in the reversion is not the petitioner's interest. It

is the interest of the petitioner's vendor, Winding Gulf Colliery Company (54)."

These erroneous statements and conclusions are further aided by the garbled excerpts quoted from the deed of August 15, 1929, on page 6 of respondent's brief. These statements, together with this garbled excerpt, present, as we think, a state of facts completely at variance and irreconcilable with the facts as disclosed by that deed itself. Other material provisions of that deed, indeed the provisions of the whole instrument, are too clear to require construction to demonstrate the false inference urged upon the Court. We deem it most misleading and unfair to the Court to leave the truth of these statements unchallenged. The most material provisions of the deed, bearing on the question, are reproduced below.[1] How any one, in the face

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[1] In this deed Winding Gulf Colliery Company is designated party of the first part, and Winding Gulf Collieries, as party of the second part.

The pertinent provision in the recitals contained in the deed, are:

"WHEREAS, the party of the second part has purchased for the consideration hereinafter mentioned *all of the property and property rights of every kind and character owned by the said party of the first part, or to which it is, or may be entitled,* and" (Emphasis ours).

GRANTING CLAUSE:

"NOW, THEREFORE, IN CONSIDERATION OF THE PREMISES and in consideration of the Sum of One Dollar (1.00) paid in cash, as well as other consideration of value, the receipt of all of which is hereby acknowledged, the said Winding Gulf Colliery Company, a corporation, party of the first part doth hereby grant, bargain, sell, convey,

of the recitals, the granting clause and the habendum clause, of that deed, can urge upon this Court such reckless

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set-over, transfer, assign and deliver unto Winding Gulf Collieries, a Corporation, party of the second part, *all of its right, title, interest and estate in and to all of the property, property rights and effects of said party of the first part of every kind and character whatsoever, excepting only that received by the said party of the first part from the party of the second part in consideration for this conveyance, as aforesaid,* and including all of its lands, rights, lease-holds, easements, rights of way, plants, equipment, stocks of goods, supplies, live stock, accounts receivable, bills receivable, securities, investments, money, claims, demands, and choses, without regard to where the said property may be situate, *or the extent or character of the interest of said party of the first part therein;* it being expressly understood that the aforesaid grant of property hereinabove mentioned includes all of the lands and leaseholds, and rights and easements in and over lands, situate in Slab Fork District of Raleigh County, West Virginia, together with the coal mining operations thereon *and all buildings, structures, improvements, equipment* and appliances erected, installed or placed thereon, which said lands, leaseholds, rights and easements were conveyed to the said party of the first part by the deeds and writings hereinafter mentioned, to which reference is here made for further and more particular description and identification of the said property, to-wit." (Emphasis ours).

* * * * * * *

(Here follows the description of 54 grants of property conveyed by the deed, which includes the land on which the school building was erected).

THE HABENDUM CLAUSE:

"TO HAVE AND TO HOLD all of the aforesaid

and unwarranted statements of fact, is beyond our comprehension, and, we think, discloses a willingness and desire to win a law suit by such means as may appear to be necessary.

Furthermore, on page 6 of respondent's brief, undoubtedly to further impress the above erroneous view upon the Court, speaking of the deed of August 23, 1924, Winding Gulf Colliery Company to The Board of Education, they say: "Said deed provided that the tract of land conveyed as aforesaid would revert to the grantor, Winding Gulf Colliery Company *and not the petitioner,* upon cessation of use thereof by respondent for school purposes." (Emphasis ours). This statement is in direct and irreconcilable conflict with the reversionary clause, which expressly says, it shall revert not only to Winding Gulf Colliery Company but to "its successors or assigns in fee simple, with like force and to the same effect as if this conveyance had never been made."[5]

Furthermore, how these contentions, presented in re-

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property, rights, privileges and easements of every kind as hereinabove mentioned and set forth, *together with all other property of every kind and character now owned by said Winding Gulf Colliery Company or to which the said Winding Gulf Colliery Company is, or may become entitled, together with all rights, privileges and appurtenances thereunto belonging or in anywise appertaining, but subject* to all of the terms, provisions, covenants, conditions and limitations in the above recited instruments contained; unto the said party of the second part, its successors and assigns forever." (Emphasis ours).

[5]The whole reversionary clause contained in the deed of August 23, 1924, is as follows:

"It is further distinctly understood and agreed by and between the parties hereto as a part of the

spondent's brief in opposition to the petition, on the matter of petitioner's succession to the rights of Winding Gulf Colliery Company, can be made in good faith, in the face of their own answer filed in the District Court, (R. 14) is indeed difficult for us to understand. The third paragraph of that answer expressly says: "That defendant, Winding Gulf Collieries, a corporation, *is the legal successor* of Winding Gulf Colliery Company, a corporation." (Emphasis ours). Such a lack of candor and fairness to the Court is seldom found in a solemn pleading, brief or argument. If Winding Gulf Collieries was the legal successor to Winding Gulf Colliery Company when the answer was filed, will it not be so when this brief was written? Can a litigant thus "blow hot and cold" with facts, on which he seeks a determination of his case? Has not the respondent, by thus urging upon the Court such inconsistencies, constructed his own petard, the explosion of which demands very careful scrutiny of his protestations in general?

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consideration for this conveyance, that the property hereby conveyed is for public free school purposes only and for no other purpose or purposes and that the same and no part thereof shall at any time be used for any other purpose or purposes whatsoever and that whenever the said property hereby conveyed shall cease to be used for public free school purposes, *the same and every part thereof shall thereupon ipso facto revert to and become reinvested in, the said party of the first part, its successors or assigns in fee simple, with like force and to the same effect as if this conveyance had never been made;"* (Emphasis ours).

FURTHER OBSERVATIONS ON STATUTORY FORM OF FIRE INSURANCE POLICY.

In respondent's opposition brief, at page 8, under the title "ARGUMENT," they quote the sole ownership paragraph of the standard form of policy, and then follow this quotation with the statement, "The Supreme Court of Appeals of West Virginia has decided a number of times that this clause may be waived by the insurer." If it is the intention, by the foregoing language, to say that the sole ownership clause of the standard statutory form can be waived, other than as provided by the statute, we join issue on the statement. The statute itself provides for a waiver of the standard form, but to effect such a waiver, as authorized by the statute, it must be "provided by agreement in writing" as required by the statute and added to the policy. Furthermore, by the next section of the statute, (Section 8, of Article 4, of Chapter 33 of the West Virginia Code, see Appendix to our original brief, p. 51) the instances of waiver are enumerated and limited and "no other or different provision, agreement or condition" of waiver than those enumerated in this section of the statute, are permissible, and even in those cases the statute requires that "no such agreement or rider shall be inconsistent with or waive any of the conditions and provisions of the standard fire insurance policy hereby established." We have no quarrel with the cases cited in support of the statement, on page 9 of respondent's brief, these cases do not sustain the subtle inference which we think was intended to be drawn from the unqualified broad statement, "The Supreme Court of Appeals of West Virginia has decided a number of times that this clause may be waived by the insurer." None of these cases would sustain an action, on the instant insurance contract, by The Board of Education, if the words,

"for account of whom it may concern," were omitted from the face of the instant policy. This, undoubtedly, was the inference sought to be made from the language used in the brief. We invite an inspection of these cases, they disclose a determined and tenacious disposition on the part of the Court to enforce the statute and deny waiver of the provisions of the statute, except in the manner and as provided by the statute. In each of the cases cited, where there was no stipulation in writing, consistent with the provisions of the statute, recovery was denied, except in the single case of Hawkins v. Southwestern Mutual Insurance Company, and that case was decided on principles of estoppel; the conduct of the insurance company was such, that to permit the company to invoke the statute, would, by its own wrongful act, perpetrate a fraud on the insured.

We would, perhaps, have been less critical of the foregoing statement, had not the respondent, in the very next paragraph, reached in, so to speak, the very middle, not only of a paragraph, but in the middle of a sentence, and that without asterisks or any other insignia indicating deletion, to take a garbled excerpt from the opinion of the Melton case for a quotation.[6] The pertinent statement, without deletion, in the paragraph from which the quotation was taken, is as follows:

> "* * * The form of the policy issued to the insured is that prescribed by law. The public has a

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[6] Melton v. Aetna Insurance Co., 110 W. Va. 73, 157 S. E. 33.

"* * * The law does not preclude one having less than a fee simple title to land or one having a building even on leased premises from obtaining insurance; but it requires that the insured put the company on notice in such instances."

> keen interest in the enforcement of insurance contracts, because of the rates it must pay for fire protection and because of the risk to life and property it must undergo when fires occur; and as an expression of that interest the legislature has provided a standard uniform policy for all fire insurance in this state, one provision of which is the requirement that a building be situate upon land owned in fee simple by the insured, unless it be provided otherwise by agreement in writing added or endorsed on the policy. * * *"

This case certainly does not afford any comfort to the respondent. The provisions and requirements of the statute could not have been more clearly stated than in the above quotation. We are not unmindful of the further statement in that same paragraph, embodied in the quotation in respondent's brief, wherein it says:

This statement in this paragraph is pure obiter dictum. There was no such case under discussion or to be decided, though respondent makes much of this part of the quotation and emphasizes the same. Certainly the Court did not, by the interpolation of this language in this paragraph, intend to imply that one insuring property on a lease, or other estate, less than fee, could make his policy valid simply by putting the company on notice. In such instances it takes more than mere notice; the statute requires "agreement in writing thereon or by rider attached thereto" to insure less than the sole and unconditional ownership. The Court in using the word "notice" undoubtedly meant "notice" by "agreement in writing" thereon or by "rider attached thereto," defining the interest or interests to be insured, or as stated in the statute, "the extent of the application of the insurance under the policy." We do not question that one having less than the fee title can have insurance, but we do assert that in such instances, under

this statute, it must be stipulated in writing, as it was in the instant case (a) to insure the whole title and every person having interest therein, by use of the words "for account of whom it may concern" or other equivalent words or language, or (b) insure only the interest of the named assured, as was done in another case cited by respondent, of Commercial Union Assurance Co. v. Jass, 36 F. (2d) 9, in which latter case, recovery was limited to the insurable interest only of the named insured.

INTENTION OF THE CONTRACTING PARTIES.

Respondent, under this heading, says that the Circuit Court of Appeals as "a matter of fact," found that there could have been no intention on the part of The Board of Education to protect Collieries, when it insured the school building in question. It was not the province of the Circuit Court of Appeals to find "as a matter of fact" what the intention of The Board of Education was, except as the same was expressed by the language used in the contract. Under the federal rules of procedure, this finding of fact, if any such finding was to be made, was peculiarly within the province of the trial court and the trial court found just as emphatically, *as a matter of fact,* that The Board of Education did intend to and did insure the whole title. We submit that the language used in the insurance contract, when given its previously judicial determined meaning, could bear no other construction, than that given it by the trial court. In the so-called finding of fact, the Circuit Court of Appeals embarked upon an inquiry of motive to discover the intention of the parties, rather than to take the plain, unambiguous, and previously determined meaning of the language used to express the intention of the parties. The Circuit Court of Appeals assumed "as a mat-

ter of fact" that The Board of Education would have had to have laid out and expended additional money to cover the whole title to the instant building, over and above the premium charged for insuring its interest in the building alone. *There is absolutely nothing in the record to justify such an assumption.* The matter of premium rates for fire insurance is a matter of statutory regulation in West Virginia. Sections 11 to 20, both inclusive, of Article 4, of Chapter 33, of the Official Code of West Virginia, deal with this whole subject and requires insurers to maintain and be members of a *rating bureau,* which has full power and authority to fix and establish insurance premium rates. Section 13 of said chapter provides that such rating bureaus shall rate risks upon schedules or flat rate. Schedule rating is used in instances of blanket policies covering a number of buildings or a whole industrial or other plant, such as was used in the instant case. Flat rate premiums are prescribed for separate units or separate buildings. Section 17 of said chapter prohibits discrimination by insurers to favored assureds.

Now, there is no proof in this record that the premium rate on the blanket policy, used in the instant case, would be greater when issued in the form it was issued than the premium rate would have been had the contract limited the indemnity to the interest of the named assured alone. There is no foundation for the assumption that this policy cost more in the form in which it was issued than it would have cost in any other form or had the property been insured on a flat rate basis. Nevertheless, the Circuit Court of Appeals assumed that it did. The courts generally are agreed that a presumption must rest upon proven facts by direct evidence and cannot be based upon or inferred from another presumption.[7]

[7] 20 Am. Jur., "Evidence," Sec. 164, p. 168.

If the intention of the instant contract is to be determined on motive, then we submit that the motive to obey the law; the motive to enter into a valid contract, outweighs any want of interest The Board of Education may have had to protect the Collieries Company. The motive was to insure the interest of The Board, but to accomplish this under the peculiar status of the title, to make their own insurance conform with the statute, they intended to, and did, insure the interest of the Collieries Company also and for aught that appears in this record, the insurance may have been cheaper in this form, than in some other basis or form in which it might have been written. Surely, there was compensating advantage to induce The Board of Education to accept this form of contract, else they would not have accepted it. We insist that where the parties were dealing in contemplation of the statute and endeavoring to comply therewith, and in the exercise of a discretion, adopted their own means of compliance, and used language necessary to make a lawful contract, then the language used should be construed that the contract when made would be lawful and the meaning of the words used are the criterion by which to determine the intention as well as the legality of the contract.

This process of reason was recognized and approved in this jurisdiction in the case of Pilgrim Lumber Company v. Federal Insurance Company, 140 F. (2d) 193. There the question before the Court was whether or not it was the intention of the contracting parties to insure two buildings or one building. Each of the buildings required a different rate, as fixed by the Rate Bureau of West Virginia. The Court, in the course of its opinion, said:

> "* * * Section 3376 of the West Virginia Code prohibits unfair discrimination by insurance com-

> panies as to premium rates, and therefore, it would have been unlawful for the insurance companies to have charged different rates on the same building, and if it had been the intention of the parties that the policy, which is the subject matter of this suit, was to cover the two buildings its rate should have been fixed with that in mind. * * * It is reasonable to assume that the insurance companies operating under the law of the state had issued their policies in accordance with the rating bureau's directions and the rates fixed for buildings of this character."

If it is reasonable to assume that the parties intended to obey the rating provisions of this statute, surely it is equally proper to assume that they intended to conform their contract to the standard form of policy prescribed by the same statute.

THE RIGHTS OF THE CLAIMANTS TO THE PROCEEDS ARISING OUT OF A MATURED FIRE INSURANCE CONTRACT ARE NOT NECESSARILY FIXED AT THE TIME OF LOSS.

We are confused as to what meaning is intended by the respondent in the use of the words, "The right of the parties to the proceeds of a fire insurance contract are fixed at the time of the loss," as used in the juxtoposition in which they appear on page 17 of respondent's brief. This statement is not always a true statement of the law. As between the insurance company and the assured, it states an academic principle of law. As between divers claimants of the insurance proceeds, the statement is not correct. The cases are legion in which the proportionate share of the respective claimants of the proceeds are determined after the date of the fire. The matter of adjustment of the proportionate amounts of the gross indemnity paid to the

respective claimants in case of life estate and remaindermen, is always a matter of adjustment after the incident of the fire. A few cases demonstrating the principle are cited in the note.[8] This statement was taken from the syllabus in the case of Crook v. Hartford Fire Insurance Company, 178 S. E. 254.

The language was used in denying one of the assured a recovery under the policy who had an insurable interest at the date of the issuance of the policy, but who had divested himself of that interest prior to the fire. Certainly, in such a case, his rights were fixed as of the date of the fire, because one not having an insurable interest at the date of the fire cannot recover indemnity because he has not been damnified. Counsel for respondent, on page 17 of their brief, cite a great many cases for this broad statement in their brief. We have examined all of these cases, and assert that none of these cases, other than the Crook case, support this broad statement, nor have we found any other cases supporting it. All of the cases cited for the proposition in respondent's brief are cases dealing with insurable interest. They all lay down the sound principle

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[8] Clyburn v. Reynolds, (S.C.) 9 S. E. 973,
Green v. Green, (S.C.) 27 S. E. 952,
Haxall's Ex'ors. v. Shippen, (Va.-1839) 10 Leigh 536, 34 Am. R. 745,
Culbertson v. Cox, 29 Minn. 309, 43 Am. R. 204, 13 N. W. 177,
Brough v. Higgins, 2 Gratt. 408, 19 Va. R. A. 423,
Crisp County Lumber Co. v. Lee Bridges, 187 Ga. 484, 200 S. E. 777,
Clark v. Leverett, 159 Ga. 487, 126 S. E. 258,
Welch v. London Assurance Corp. (Pa.) 151 Pa. St. 607, 25 Atl. 142,
Sampson v. Grogan, (R.I.) 42 Atl. 712, Opinion of the Court, 717.

of law that the assured claiming under a policy of insurance must have an insurable interest as of the date of the fire. The foregoing quoted statement from respondent's brief means just this, and nothing more.

ANALYSIS OF QUESTIONS SUGGESTED ON PAGES 18, 19 AND 20 IN RESPONDENT'S BRIEF.

At pages 18, 19 and 20 of respondent's brief, they quote Section 48, Chapter 45, of Barnes' 1923 Code of West Virginia. Immediately following this quotation, they say:

> "The statute above quoted, fixing the powers of the respondent in its acquisition and disposition of property for school purposes was specifically recognized in the deed to this respondent's predecessor by the grantor stipulating against liability for damages to buildings occasioned by mining (21). The stipulation recognized the respondent's statutory right to sell or remove buildings upon cessation of use for school purposes."

There are two wholly separate and distinct questions, having no logical relation to each other, presented by this quotation, (a) whether or not the deed of August 23, 1924, "recognized respondent's statutory right to sell or remove buildings upon cessation of use for school purposes," and (b) the question as to whether the quoted statute is the true statute "fixing the powers of the respondent in its acquisition and disposition of property for school purposes." We challenge the correctness of both propositions asserted in this quotation. We quote in the note the stipulation referred to in the deed.[9] It requires miraculous

[9] "It being expressly understood and agreed and made a condition hereof that the party of the second part, its successors and assigns, in the event of

reasoning to understand how any person can glean from that stipulation in that deed any recognition of respondent's so-called "statutory right" to sell or remove the buildings upon cessation of the use for school purposes. There is nothing appearing in the deed to suggest the question. The reason for that stipulation in the deed is too patent to require discussion, and the suggestion is too frivilous to require any argument. Indeed, we fail to find any premise for argument on the question suggested by the above quotation from respondent's brief, in relation to that deed. The deed itself is a complete answer to the suggested question.

SECTION 48, OF CHAPTER 45, OF BARNES' 1923 CODE OF WEST VIRGINIA, DOES NOT TRULY PRESENT THE POWERS OF THE BOARD OF EDUCATION IN ITS ACQUISITION AND DISPOSITION OF PROPERTY.

The quoted statute in respondent's brief, Section 48, of Chapter 45, of Barnes' 1923 Code of West Virginia, has nothing at all to do with the matter of acquisition of property for school purposes. The Board of Education of the District of Slab Fork in the County of Raleigh, predecessor of the petitioner in this case, had its corporate existence under Section 46, of Chapter 45, Barnes' 1923 Code of West Virginia, (R. 128) the pertinent provisions of which are as follows:

> damage to the surface of the said lot or parcel of land or to any building or buildings erected thereon occasioned by the removal of the coal, minerals, metals or metallic substances underlying the surface of said land shall have no claim or right of recovery against the party of the first part, its successors or assigns therefor."

> "The board of education of each district shall be a corporation by the name of 'The board of education of the district of ..... in the county of .....,' and as such may sue and be sued, plead and be impleaded, contract and be contracted with: * * *. Said board shall, according to law, hold and dispose of any real estate or personal property belonging to said corporation or its predecessors, or that may hereafter come into its possession. Said board shall receive, hold, and dispose of, according to law, and the intent of the instrument conferring title, any gift, grant, devise or bequest. * * *"

It is apparent and, we think, perfectly clear that there was no limitation upon a district board of education in West Virginia in the acquisiton of school sites, in relation to the nature of estate acquired, whether it be a base fee, a fee simple determinable or a fee simple subject to conditional limitation, and the authorities generally seem to lay down the principle that boards of education or quasi public corporations, acting in their proprietary capacity, acquire property subject to the same principles of common law as applies to other purchasers of property. Section 46, of Chapter 45, of Barnes' 1923 West Virginia Code, conferred this power upon the then district boards of education in broad and comprehensive language. Power was delegated to them to contract and be contracted with in relation to the matters entrusted to them. Immediately following this broad delegation of corporate power to contract, it is provided that the board shall (a) *receive*, (b) *hold*, (c) *dispose of, any gift, grant*, devise or bequest. There is no limitation upon the estate to be contracted for or received or held. It is any gift or any grant.

Furthermore, the provisions of Section 49, of Chapter 45, of Barnes' 1923 West Virginia Code, are equally as broad. "The boards of education of every district * * *

shall *provide by purchase,* condemnation *or otherwise,* such land as may be necessary for school buildings * * * and shall have authority to make the necessary expenditures for the improvement of such lands." (Emphasis our own). This statute enjoins upon the board of education, not only the authority, but the duty, *to provide* such lands as may be necessary for school buildings. The performance of this duty is left to the discretion of the board, a discretion to purchase and determine what estate is necessary. The statute does not restrict the board to the ways and means of *providing* the lands, nor the estate to be acquired in the lands. The word, "purchase," in this statute was intended, of course, to have its usual meaning. Bouvier's Law Dictionary says that the word, "purchase" is "a term including every mode of acquisition of estate known to the law, except that by which an heir on the death of his ancestor becomes substituted in his place as owner by operation of law." To *provide* a school site by purchase contemplates barter and agreement between the grantor and the grantee and the statute does not say what that agreement shall be, how broad the estate shall be granted or what limitation shall be attached to the estate granted. It is a matter for the board, in the exercise of its discretion, to contract and to be contracted with in the performance of this duty. After the board has thus contracted and provided the lands, by section 46 it is authorized to accept a grant and to hold the lands "according to the intent of the instrument conferring title." These statutes read together, as they must be, confer upon boards of education a wide and broad scope of authority to contract with reference to the purchase of lands. The Supreme Court of West Virginia, in the case of Board of Education

of Elk District v. Harvey,[10] recognized this power and authority and sustained a verbal lease taken by the Board of Education on which it built a building with the public funds of the district, contracting verbally that the building should become the property of the lessor when the same ceased to be used as a school building.

THE DOCTRINE OF ULTRA VIRES IS WITHOUT FOUNDATION IN FACT UNDER THESE STATUTES.

We assume, though respondent does not in its brief so state, that it is intended to raise the question of the authority of The Board of Education to accept the deed of August 23, 1924, with the stipulation for reversion. This contention cannot be sustained. The statute provides that The Board shall make disposition (a) according to law, and (b) according to the intent of the instrument conferring title. This is explicit authority to accept a deed with the reversionary clause. The statute quoted in respondent's brief has no application at all in the matter of disposition of school buildings, unless The Board of Education owned the property in fee simple. The quoted statute received construction by the Supreme Court of West Virginia, in the case of Board of Education of Elk District v. Harvey, and expressly held:

> "Sec. 33, ch. 45, Code 1899, authorizing boards of education to sell school houses that are not needed for public schools, and giving the purchaser right to remove them in certain instances, has no bearing upon this case. The legislature cannot empower a

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[10] Board of Education of Elk District v. Harvey, 70 W. Va. 480, 74 S. E. 507.

board of education to sell property that it does not own. *The statute presupposes title in the board for the public use.*" (Emphasis ours).

DECISIONS OF OHIO AND KENTUCKY NOT APPLICABLE.

We shall not burden the Court with a discussion of the statutes and decisions of Ohio and Kentucky referred to in respondent's brief, in as much as those decisions are influenced by the respective statutes of those states, neither of which are comparable in scope with the Statute of West Virginia. Furthermore, we discussed this whole question in our brief filed in the Circuit Court of Appeals, at pages 25 to 34, both inclusive, and if the Court should be interested in further discussion of the question, we respectfully direct the Court's attention to that brief.

POWER OF THE BOARD OF EDUCATION TO ENTER INTO THE CONTRACT OF INSURANCE.

On page 23 of respondent's brief, they make this statement:

> "The Supreme Court of West Virginia has also specifically decided that the power of a board of education of the state to take out insurance is strictly limited. Assuming that petitioner had a reversionary interest in the building at the time of the loss, yet respondent had no power, if it had desired to do so, to insure such an interest."

For this proposition they cite the case of Board of Education v. Insurance Company, 116 W. Va. 503. The case cited and relied on for the foregoing quotation was a case in which the Board of Education had used public funds to purchase an insurance in which it had no interest whatsoever in the subject matter of the insurance. It was a

case of complete failure of insurable interest. There is no evidence in this case, nor does it anywhere appear in this record that it cost The Board of Education one additional penny to insure the whole title in the instant case more than it would have cost to insure the insurable interest of The Board alone. The whole matter of insurance rates and premiums, as we have hereinbefore demonstrated, is a matter regulated by the rating bureau, established under the Statutes of West Virginia. What those rates were or how they affected the judgment and discretion of The Board of Education in purchasing the insurance, does not appear in this record. In the absence of any showing of misapplication of the public funds in the purchase of this insurance, it will be presumed that there was no misapplication of funds by the public officers who procured the insurance.[11]

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[11] 10 R. C. L., "Evidence," Sec. 27, p. 880,
20 Am. Jur., "Evidence," Sec. 170, p. 174, Sec. 171, p. 177,
The Bank of the United States v. Dandridge, 12 Wheat. 64, 6 L. Ed. 552 (quote from page 554),
Osburn v. Staley, 5 W. Va. 85,
Loan Ass'n. v. Sohn, 54 W. Va. 101, 116, 46 S. E. 222, 228,
Mollohon v. Cavender, 75 W. Va. 36, Opinion of the Court, 42, 83 S. E. 78,
Carmichael v. Reed, 76 W. Va. 672, 680, 86 S. E. 662, 665,
20 Am. Jur., "Evidence," Sec. 177, p. 182,
Sterns Co. v. National Bank of the City of New York, 147 U. S. 91, 37 L. Ed. 93, Syl. 4 and 5,
Larned v. Jenkins, 113 Fed. 634,
43 C. J., "Municipal Corporations," Sec. 2108, p. 1347,
Knox County v. National Bank of City of New York, 147 U. S. 90, 37 L. Ed. 93.

CONCLUSION.

The respondent has given much prominence to the case of New Orleans v. W. R. Grace & Company. They quote from the syllabus of that case and say that the decision of the Circuit Court of Appeals is in harmony with that decision. As we read the Grace case, it presented the simple question of the claimant seeking to recover under the insurance policy, when it was apparent from all the attending circumstances that he had no insurable interest in the subject covered by the policy. We think the case has no application whatsoever. It does recognize the principle on which we base our claim and is of greater authority for our position than the position claimed by the respondent herein.

We respectfully, therefore, urge upon the Court that there is nothing in respondent's brief to warrant a denial of the writ of certiorari prayed for.

Respectfully submitted,

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